TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 208

OTIS SPROUT, PLAINTIFF IN ERROR,

vs.

CITY OF SOUTH BEND, INDIANA

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA

FILED MARCH 28, 1927

(32,573)

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[fol. a] **IN SUPREME COURT OF INDIANA**

OTIS SPROUT, Plaintiff in Error,

vs.

CITY OF SOUTH BEND, INDIANA, Defendant in Error

WRIT OF ERROR

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Indiana, Greetings:

Because in the record and proceedings as also in the rendition of the Judgment of a plea, which is in the said Supreme Court of Indiana before you, or some of you, being the highest court of law and equity of the said State in which a decision could be had, in the said suit between Otis Sprout, appellant, and plaintiff in error, and City of South Bend, Indiana, appellee, and defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was in favor of their validity, or wherein was drawn a question of the validity of the statute or authority exercised under said state, on the grounds of their being repugnant to the constitution, treaties, or laws of the United States, the decision was in favor of such, their validity, or wherein any title, right, privilege or immunity was claimed under the constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such constitution, treaty, statute or commission, or authority, a manifest error has happened to the great damage of the [fol. b] said Otis Sprout, appellant and plaintiff in error, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seals, distinctly and openly you send the record, and proceedings aforesaid with all things concerning the

same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington within thirty days from the date thereof, that the records and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein, to correct that error what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 18th day of March, in the year of our Lord one thousand nine hundred twenty-seven.

William P. Kappes, Clerk of the District Court of the United States for the District of Indiana, South Bend Division. (Seal District Court of the United States, District of Indiana.)

Allowed by Honorable William B. Gemmill, Chief Justice of the Supreme Court of Indiana.

[fol. 1] [Caption omitted]

[fol. 2] IN SUPREME COURT OF INDIANA

[Title omitted]

ASSIGNMENT OF ERROR—Filed June 3, 1924

The appellant shows and represents unto this Court that there is manifest error appearing in the record and proceedings and judgment of the trial court in this cause, prejudicial to the appellant, in each of the following particulars:

1. The trial court erred in overruling the motion of appellant for a new trial.

Wherefore Appellant prays that the judgment of the lower court be reversed in all things.

Isaac Kane Parks, Walter R. Arnold, Attorneys for Appellant, South Bend, Indiana.

[File endorsement omitted.]

[fol. 3] [Caption omitted]

In City Court of South Bend, Indiana

Cause No. 38126

City of So. Bend

vs.

Otis Sprout

Offense: Driving Bus Without City License

[fol. 4] Judgment

Comes now the City of So. Bend, Indiana, by Lewis W. Hammond, City Attorney; comes also the defendant Otis Sprout in person and by attorney, Isaac Kane Parks, and the defendant having been duly arraigned on the affidavit filed herewith, and for his plea says that he is not guilty as charged in the affidavit herein and the court having heard the evidence and being fully advised in the premises, finds said defendant guilty as charged in the affidavit.

It is, therefore, considered and adjudged by the court that said defendant *is* guilty as charged, that he make his fine to the City of South Bend, Indiana, in the sum of Five ($5.00) Dollars, that he be confined in the St. Joseph County Jail for a term of — days and that he pay and satisfy the costs and charges herein taxed at Five —, and that he stand committed to the St. Joseph County Jail for the space of — days and until said fine and costs are paid or replevied.

[File endorsement omitted]

In City Court of South Bend

[Title omitted]

Motion for Appeal and Order Allowing Same—Filed in Supreme Court June 3, 1924

Comes now the defendant and moves the Court for an appeal in said cause to the St. Joseph Circuit Court and as surety for the fine and costs therein and costs of said ap-

peal, and that said defendant Otis Sprout will appear at the first day of the next term of the Circuit Court of said St. Joseph County, Indiana, and from day to day thereafter, to answer the charge of driving bus without city license, as set out in the affidavit herein, and prosecute said cause to effect and abide the judgment of the court, Isaac Kane Parks acknowledge- *themselves* to owe the City of South Bend, Indiana, the sum of Fifty ($50.00) dollars for [fol. 5] the payment of such fine and costs as may be assessed by said Circuit Court in said cause, and for the appearance of said defendant at the next term of said Circuit Court, and the prosecution of said cause to effect, and, therefore, the said appeal is granted and the Court now forwards to and files with the Clerk of said Circuit Court full and complete transcript and papers in said cause, in words and figures the following:

IN CITY COURT OF SOUTH BEND

[Title omitted]

COMPLAINT—Filed June 5, 1923

The plaintiff above named complains of the defendant in above entitled cause and says:

That on or about the 30th day of May, 1923, the said defendant, then being a resident of the said County of St. Joseph, and being at said time within the corporate limits of the said city of South Bend, did then and there operate a commercial vehicle upon a public street of said City without having first obtained a license from said City so to do.

Contrary to Section- 1, 2, 3, 4 of an Ordinance #2229 adopted by the Common Council of said City, December 27, 1921, and to the damage of said City in the sum of $100.

Wherefore plaintiff demands judgment against defendant for $100 & costs.

Lewis W. Hammond, Atty. for Plaintiff.

[fol. 6] *Duly sworn to by George Omacht. Jurat omitted in printing.*

[File endorsement omitted]

Bond on Appeal for $50.00 approved, omitted in printing.

[fol. 7] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 8] In Circuit Court of St. Joseph County

Order Setting Cause—March 26, 1924

Come now the parties herein and this cause is set for trial as the first court case for this term.

In the City Court of South Bend

The City of South Bend, Indiana,

vs.

Otis Sprout

Answer—Filed March 31, 1924

Comes now the defendant in the above entitled cause and for answer unto the complaint herein, says:

1. The said sections 1, 2, 3, 4, 5, 6, and 7 of the Ordinance No. 2229, upon which the complaint herein is drawn, and each of said sections, are void, unlawful and of no effect, being without the power of the Common Council of said City of South Bend to pass and adopt, and no cause of action can, therefore, be predicated thereon or upon any [fol. 9] one of said sections aforesaid.

2. Defendant further says said ordinance and each section aforesaid, are not and never were in force and effect for the reason that the said ordinance was not duly published in two newspapers of general circulation, published in the said city of South Bend, Indiana, and that there are and ever since the passage of said ordinance were published and circulated in said city two daily newspapers of general

circulation of opposite political faith to-wit: one being the Republican faith and the other of the Democratic Faith.

3. Defendant further says that said ordinance and each section aforesaid *is* null and void and without the power of the Common Council to enact because expressly prohibited by Sec. 10476d Burns' Rev. Stat. of Indiana of 1914, and because the terms thereof provide for double taxation in that it provides for a tax upon each vehicle of the kind operated by the defendant of $200.00 per year, and defendant's property is also taxed under the general taxing power of the State of Indiana, the City of Mishawaka, Penn Township and the County of St. Joseph, Indiana, and the said tax as so imposed is not an assessment for benefits or local improvements, but an invalid attempt to procure revenue from the operation of certain vehicles specified in said ordinance for the general treasury of said city.

4. Defendant further says that the amount of license fee fixed by said sections of said ordinance mentioned in the complaint herein is excessive and ex*h*orbitant and far exceeds a sum as will fairly and reasonably compensate the City of South Bend for the expense of administering the said ordinance or cognate ordinances affecting the regulation of commercial vehicles as in said ordinance defined.

5. The condition prece*n*dent to procuring license as fixed [fol. 10] by said ordinance is the procurement of policy of insurance to indemnify against loss or damage to passengers carried by the licensee, and said provision is invalid and void in that it is not within the power of the common council of the city to legislate concerning the effecting of contracts between persons dealing with each other as assured and insurer*e*, nor as between carrier and passenger, and no authority is delegated to said common council of said city by the Legislature of the State to provide for indemnity contracts between parties not engaged in municipal enterprise of any character. And the said provision of said ordinance attempts to discriminate as to sureties to be qualified on bonds, to-wit: attempt is made to require a person following the lawful occupation of transporting passengers to insure his liability to the passengers he carries in some insurance company organized

and doing business or authorized to do business in the State of Indiana, and no other kind of surety will be accepted. The defendant operates a motor bus for the carriage of passengers exclusively between points in the State of Michigan and the State of Indiana, and should be at liberty to choose in which state he shall take an indemnity contract, if at all, but said ordinance attempts to cut off his right and limit his discretion in the matter.

6. Defendant further says that at the time mentioned in the complaint herein he was, and has been for a long time prior thereto, engaged exclusively in the business of transporting persons and baggage in interstate commerce, to-wit: From the State of Michigan into the State of Indiana; that he has at no time taken passengers for transportation from a point within one state to another point in the same State, but all passengers taken for hire are taken for the purpose of being transported only in interstate commerce. That the attempt to impose the burdens, duties, impositions and regulations of said ordinance and each section thereof which defendant is alleged by said complaint [fol. 11] to have violated, would be burdening interstate commerce and an invalid attempt at regulating commerce between the states, from which defendant says, he and his business are immune except as reasonable police regulations while within the city of South Bend may be imposed on him and he be required to conform thereto, but that the ordinance and each section thereof as aforesaid, do not attempt to regulate his conduct while in the City of South Bend, Indiana, but attempt to control, interfere with, and specially legislate against the free conduct of an interstate transportation line.

7. Defendant further says that said ordinance and each section thereof named in the complaint herein is void and in violation of the 1st Article of the Constitution of the State of Indiana, and the 23d Section of said article, and likewise is in conflict with the 14th amendment to the Constitution of the United States.

Isaac Kane Parks, Walter R. Arnold, Attorneys for Defendant.

IN CIRCUIT COURT OF ST. JOSEPH COUNTY

MINUTE ENTRY OF REPLY

And the plaintiff now files a reply in general denial to the answer herein.

IN CIRCUIT COURT OF ST. JOSEPH COUNTY

JUDGMENT—April 10, 1924

Come now the parties herein and now this cause is submitted to the court and the evidence heretofore begun is resumed and concluded and the court having heard the same and being advised in the premises now finds for the plaintiff herein and against the defendant, for the sum of Fifty dollars, ($50.00) for which sum the plaintiff is entitled to judgment.

[fol. 12] It is, therefore, considered and adjudged by the court that the plaintiff recover of and from the defendant herein the sum of Fifty Dollars, ($50.00), together with the costs of this action laid out and expended, taxed at $—.

[fol. 13] IN CIRCUIT COURT OF ST. JOSEPH COUNTY

CITY OF SOUTH BEND

vs.

OTIS SPROUT

MOTION FOR NEW TRIAL AND ORDER OVERRULING SAME

Comes now the defendant and moves the court for a new trial of the above entitled cause on each of the following grounds:

1. The decision of the court is not sustained by sufficient evidence.

2. The decision of the court is contrary to law.

3. The ordinance number 2779, of the City of South Bend, Indiana, each sections numbered 1, 2, 3 and 4 thereof

if the same be construed to apply to interstate commerce, are invalid and of no effect, unenforceable and void because:

(a) The said ordinance is violative of Section 8 of Article "1" of the Constitution of the United States, in that it assumes and affects to regulate commerce among the several states, and by its terms imposes upon interstate commerce burdens not permitted by the Federal Constitution.

(b) The said ordinance upon which plaintiff's action is based, and each the said sections 1, 2, 3 and 4 thereof, are in violation of the 14th amendment to the Federal Constitution in that it assumes to deprive the defendant of his liberty and property without due process of law.

(d) The said ordinance, and particularly each sections 1, 2, 3 and 4 thereof, upon which plaintiff's action is predicated, is violative of the 14th amendment to the Federal Constitution in that it assumes to deny to the defendant, a citizen of the United States, within the jurisdiction of the State of Indiana, the equal protection of the laws, but on the contrary, insofar as the conduct of a lawful business is concerned, assumes to impose upon him burdens and en- [fol. 14] force exactions not imposed upon or enforced as against others in similar circumstances, and exercising similar rights or privileges.

(e) The said ordinance numbered 2229, and particularly Sections 1, 2, 3 and 4 thereof, are violative of Section 21 of Article "1" of the Constitution of the State of Indiana, in that it is thereby assumed to take the defendant's property without just compensation.

(f) The said ordinance Numbered 2229, and particularly Sections 1, 2, 3 and 4 thereof, upon which the action of the plaintiffs herein is based, are null and void and unenforceable because offensive to section 23 of article "1" of the Constitution of the State of Indiana, in that it is assumed thereby to grant to citizens and classes of citizens other than the defendant, who is a citizen of the State of Indiana, privileges and immunity which, upon the same terms, does not equally belong to the defendant and others in his class,

to-wit: Operators of motor vehicles for commercial purposes between points in the city of South Bend, and points outside of the city of South Bend, Indiana, making an unjust discrimination between carriers of persons for hire and carriers of freight and other articles of commerce for hire.

(g) Said section is void and invalid because in conflict with and violative of Section 10476-d of Burns' Compiled Statutes of the State of Indiana, of 1914.

Isaac Kane Parks, Walter R. Arnold, Attorneys for Defendant.

[fol. 15] And the court having examined the same, and being well advised in the premises, now overrules said motion, to which ruling of the court the defendant at the time excepts, and now a period of thirty days' time is given in which to file all bills of exceptions.

IN CIRCUIT COURT OF ST. JOSEPH COUNTY

MOTION FOR APPEAL AND ORDER ALLOWING SAME

And the defendant now prays an appeal to the Supreme Court of the State of Indiana, which appeal is granted upon the condition that the defendant file an appeal bond in the sum of One Hundred Dollars ($100.00), within thirty days, with Isaac Kane Parks as surety thereon, which surety is now approved by the court.

[fols. 16 & 17] Bond on appeal for $100.00, approved and filed April 24, 1924, omitted in printing.

[fols. 18 & 19] Comes now the defendant herein and presents his bill of exceptions No. 1, containing the evidence, which said bill is now approved, signed by the court, and filed with the Clerk and made a part of the record, and reads in the words and figures following, to-wit:

In Circuit Court of St. Joseph County

#20103

City of South Bend, Indiana,

vs.

Otis Sprout

Bill of Exception No. 1

Caption

Be it remembered that at the trial of the above entitled cause, coming on for hearing on the 31st day of March, 1924, the same being the 49th judicial day of the February Term, 1924, of said Court, before the Honorable Walter A. Funk, Judge of said court, without the intervention of a jury, the following evidence, and none other, was heard in support of the issues tendered therein by the respective parties to said action:

[fol. 20] Evidence on Behalf of the Plaintiff & Defendant

Stipulation of Facts

It is hereby stipulated and agreed by and between the parties to the before entitled cause, by their respective Attorneys, as follows, to-wit:

That on the 30th day of May, 1923, and for several months prior thereto, practically daily, the defendant, a resident of the City of Mishawaka, St. Joseph County, State of Indiana, operated between the City of South Bend, Indiana, and the City of Niles, Michigan, a motor bus, for the transportation of passengers between the said City of South Bend, Indiana, and said City of Niles, Michigan;

And in the course of such transportation did enter into the corporate limits of the said City of South Bend, daily, and there offered himself and his vehicle as instruments of transportation for passengers from said City of South Bend to the said City of Niles, Michigan, and all points intermediate between the City of South Bend and the City of Niles, north of the State line separating the State of

Indiana from the State of Michigan; and in the solicitation of passengers for transportation, and in making contracts of passage, stated that he was engaged in effecting transportation only between points in the State of Indiana and points in the State of Michigan; but that if passengers who were taken aboard his bus for transportation desired to leave the said bus prior to the passage from Indiana into Michigan, they were at liberty to do so, if defendant's bus stopped before reaching the Indiana and Michigan State [fol. 21] line; but they would be obliged to pay transportation to some point in Michigan, if passage was taken within the State of Indiana; and if passage were taken in the State of Michigan, they would have to pay transportation to some point in the State of Indiana;

And that it was defendant's practice, on said day, and for several months prior thereto, on making stops after leaving the City of South Bend, Indiana, to permit passengers who had taken passage to some point north of the State line between Indiana and Michigan, to alight from said bus, and that they did so on numerous occasions;

And that said bus was at all of said times a vehicle meeting and conforming to the definition of "commercial vehicle," as used in Ordinance Number 2229 of the City of South Bend, Indiana;

And that defendant in the course of his said operations did use the public highways within the said City of South Bend.

That Ordinance Number 2135 of the said City of South Bend is in the words and figures following, to-wit:

[fol. 22] Ordinance No. 2135

Filed June 3, 1924. Zach T. Duncan, Clerk

An ordinance regulating and requiring licenses for the operation of motor vehicles used in the city of South Bend, State of Indiana, for public hire and providing for revocation of the licenses therefor and penalties for the violation thereof

Be it ordained by the Common Council of the City of South Bend, Indiana, that:

Classification

Section 1. Every motor vehicle and electric vehicle operated by a person or persons, firm, co-partnership or corporation, along and upon any public street or highway within the city of South Bend, State of Indiana, for the purposes of affording a means of local street or highway transportation by indiscriminately accepting and discharging such persons as may offer themselves for transportation, either at temporary street or highway parking places or along the course or within the territory on which said vehicle is or may be running or operating or that may be operated for the transportation of passengers from place to place in or about said city, from any street curb, alley or highway either upon call or otherwise, from such is hereby declared to be a commercial vehicle for hire and hereinafter referred to as "commercial vehicles" provided, however this ordinance shall not include nor apply to motor vehicles known as "taxicabs" operated only upon call by a special contract of hire, and operated only from a garage or railroad depot or regular stand and stationed at all times when not in operation at a garage or railroad depot, or to bussess or to motor vehicles owned and operated by hotel companies or hotel proprietors, between their hotels and depots for their exclusive use and benefit in conveying their guests to and from the same.

[fol. 23] Section 2. No person, firm, co-partnership or corporation shall operate any such commercial vehicle commonly known as a jitney bus and it shall be unlawful to do so, unless there shall have been filed with the city controller of said city a liability contract of insurance issued to such person, persons, firm, co-partnership or corporation, by an insurance company, organized under the laws of the State of Indiana, or authorized to transact business therein, providing among other things, for the payment of any final judgment that may be rendered against the insured for damages to property or by bodily injury or death to others, resulting from accident or collision for which said person, persons, co-partnership, firm or corporation may be liable, while operating the commercial vehicles described therein within the provisions hereof by reason of and growing out of the negligent operation of such com-

mercial vehicle, in a sum not exceeding one thousand ($1,000.00) dollars to any one person or twenty-five hundred ($2,500.00) dollars to more than one person as a result of one accident.

It shall be the duty of every person, persons, firm, co-partnership or corporation to keep such insurance in force during the full period of time for which he, they or it may be operating hereunder, and in case said policy contract of insurance is cancelled, said city shall be notified, and if said policy of insurance be cancelled, such commercial vehicles shall not be operated until a policy of insurance meeting the requirements of this section shall have been filed. No cancellation of any such policy of insurance shall affect any liability incurred. Any license issued or hereinafter provided shall become void, if the contract of insurance shall for any reason be cancelled or be allowed to lapse.

Section 3. Such policy contract of insurance shall be accompanied by an application upon blanks furnished by the city, stating the name, age, (if an individual) business and [fol. 24] residence of the applicant and the length of time which *ichich* applicant has operated motor driven vehicles; the method and manner of operation and the proposed *house* the character of operation and the rate of fare to be charged for carriage therein, state license number and a description of the same by factory number and maker's name, rated seating capacity and number of persons capable of being carried therein at one time.

Section 4. If the application and policy contract of insurance complies with the provisions hereinbefore set forth and the applicant has paid the hereinafter required license fee, the city controller of said city, shall thereupon issue to said applicant a license permitting the operator of said commercial vehicle commonly known as a jitney bus therein described, under the provisions of this ordinance, which license shall be numbered serially, and to contain the number of such motor vehicle, state license number, date of its issuance and expiration thereof. It shall be the duty of the person, persons, firm, co-partnership or corporation receiving such license, to plainly mark in a permanent manner such commercial vehicle covered thereby by painting or

securely fastening upon the sides thereof, in letters not less than two (2) inches in height and the lines of which shall be not less than one-quarter (¼) inches in width, the words "Insured Carrier" followed by the city license number, so that all such commercial vehicles claimed to be operated under the provisions of this ordinance may be readily identified.

Amount of License

Section 5. Any person, persons, firm, co-partnership or corporation desiring to obtain a license hereunder, shall pay to the City Controller for the benefit of said city, for each commercial vehicle commonly known as a jitney bus to be so driven or operated, an annual license fee as follows, to-wit:

[fol. 25] (a) $25.00 for a vehicle having a rated seating capacity for five passengers or less.

(b) $35.00 for a vehicle having a rated seating capacity for more than five and not more than seven passengers.

(c) $50.00 for a vehicle having a rated seating capacity of more than seven or not over twelve passengers.

(d) $75.00 for a vehicle having a rated seating capacity for more than twelve passengers.

Provided, that the foregoing license fee shall not apply to commercial vehicles which are operated under the terms of any contract entered into by the owner thereof with the Board of Public Works, and ratified by the Common Council and which are operated regularly under a regular time schedule. And provided further that the license fees for such vehicles so operated under such contract and which have a rated seating capacity of more than twelve passengers, shall be $50.00 per year. Provided also that no license is required for vehicles held in reserve for the purpose of substituting while vehicles on which a license has been issued are being repaired, in which case the license tag on the vehicle for which a license has been issued, and which is being repaired may be transferred temporarily to such reserve vehicle while it is being used as a substitute for the regular vehicle.

Section 6. The license issued by the City Controller shall be for the calendar year beginning on January first and ending on Dec. 31st. The license fee for any license issued before July 1st, shall be the full annual fee, and for licenses issued on or after July 1st, shall be one-half of the annual license fee. After a license has been issued in no event shall the licensee be entitled to a rebate on account of the cancellation or abandonment of the license, nor shall the same be transferable.

Section 7. It shall be unlawful for anyone having a city license to operate such commercial vehicles on the streets and routes on which a regular service is being maintained according to a regular time schedule by virtue of and under [fol. 26] the terms of any contract entered into by the owner of such vehicle and the Board of Public Works and which contract is ratified by the Common Council unless a permit to operate on such streets and routes has first been procured from the Board of Public Works after first filing with them a verified statement that public convenience and necessity requires such additional service which shall then be signed by a sufficient number of residents along such streets or routes showing that public necessity requires such additional service, in which event after a proper hearing the Board of Public Works shall have power to issue such permit provided such applicant gives a 10 days' written notice to such person, firm or corporation then operating a regular service on such streets or routes under the terms of such contract.

Section 8. The rate of fare of any commercial vehicle commonly known as a jitney bus, operated hereunder while transporting passengers shall not exceed five cents for one passenger for one continuous trip one way between the hours of 5 a. m. and midnight, unless the rate of fare is posted in a conspicuous place on such vehicle so that the same may be plainly seen and read by passengers upon entering, provided, however, no change in the amount of fare to be charged shall be made between 5 a. m. and midnight.

Lost Articles

Section 9. It shall be the duty of every person, persons, firm, co-partnership or corporation operating under the

provisions hereof to promptly notify the police department of said city of South Bend of all articles found in any such commercial vehicles, commonly known as a jitney bus, operated by them, and of a description thereof, where they are kept and may be found, so as to be returned to the owner.

Revocation of License

Section 10. Any license issued under the terms of this [fol. 27] ordinance may be revoked by the mayor, if the holder of said license shall have been twice convicted for the violation of any of the terms of this ordinance or of any other ordinance or the laws of the State of Indiana regulating or controlling traffic upon the streets of the city of South Bend, or if, upon the report of the Chief of Police, it is made to appear that the vehicles so licensed is not properly constructed, or is not in good repair or is not a safe conveyance for the transportation of passengers. Any holder of any license under the terms of this ordinance who shall have had such license revoked shall not be entitled to any license for the terms of one year from the date of such revocation.

Section 11. It shall be unlawful for any persons while operating any vehicle licensed under this ordinance to collect any fare or fares, or give any change to any person while the same is in motion.

Section 12. It shall be unlawful for any person, persons firm, co-partnership or corporation to operate or cause to be operated any commercial vehicle known as a jitney bus, on any or either of the following streets in the City of South Bend, to-wit: Washington Ave., Michigan St., Lincoln Way E., Lincoln Way W., East Jefferson Blvd., or N. Hill St.

Section 13. Any person, persons, firm, co-partnership or corporation upon conviction for the violation or failure to comply with any provisions of this ordinance, shall be fined in any sum not more than One Hundred ($100.00) Dollars for each and every offense hereunder and each day's operation in violation hereof shall constitute a separate offense.

Section 14. Be it further ordained that all ordinances in conflict herewith shall be and the same are hereby repealed.

Enacting Clause

Section 15. If any provision or section of this ordinance [fol. 28] shall be held void or unconstitutional for any reason all other provisions and sections which are not expressly held void or unconstitutional shall be and continue in full force and effect.

Section 16. This ordinance shall be in full force beginning thirty days from and after its passage and legal publication according to law.

Edward Hagey, Member Common Council.

Ordinance No. 2135.

Passed by the Common Council of the City of South Bend Ind., 10th January, 1921.

Attest:

Frank S. Bilinski, City Clerk.

Attest:

Frank R. Wisniewski, President of Common Council.

Presented by me to the Mayor of the City of South Bend, Ind., January 11th, 1921.

Frank S. Bilinski, City Clerk.

Approved and signed by me 12th January, 1921.

Franklin R. Carson, Mayor.

[fol. 29] That Ordinance Number 2229 of the said City of South Bend, wherein reference is made to City Ordinance Number 2135, is in the words and figures following,to-wit:

(Filed June 3, 1924. Zach T. Dungan, Clerk.)

[fol. 30] Ordinance No. 2229

An ordinance prohibiting the use of certain named streets and avenues by commercial vehicles and providing for the license and tax for commercial vehicles and liability insurance and providing penalties for violations and the repeal of ordinance number 2208

Be it ordained by the Common Council of the City of South Bend, Indiana, that:

Section I. Every motor vehicle operated by a person or persons, firm, corporation, or co-partnership along and upon any public street, or highway within the City of South Bend, State of Indiana, for the purpose of affording a means of street or highway transportation by indiscriminately accepting such persons as may offer themselves for transportation, from a point within the City of South Bend to a point outside the limits of the City of South Bend, and from a point without to a point within the City of South Bend, is hereby declared to be, for the purpose of this ordinance, a commercial motor vehicle for hire; provided however, this ordinance shall not include or apply to a street or interurban railway cars or motor vehicles known as "taxicabs" operated only upon call by a special contract of hire, and operated only from a garage railroad station or regular stand, and stationed at all times when not in operation, at a garage, railroad depot or regular stand, or to busses, or motor vehicles owned and operated by hotel companies, or hotel proprietors, between their hotels and depots, for their exclusive use and benefit, in conveying their *q*uests to and from the same.

Section II. It shall be unlawful for any person, persons, firm, co-partnership, or corporation to operate or cause to be operated either any commercial vehicles as defined heremnbefore or any commercial vehicles defined in Section I of [fol. 31] Ordinance Number 2135 entitled "An Ordinance Regulating and Requiring Licenses for the Operation of Motor Vehicles used in the City of South Bend, Indiana, for Public Hire and Providing for Revocation of the License therefor and Penalties for the Violation thereof, on any or either of the following named improved streets or avenues in the said city of South Bend, Indiana, to-wit: North Michigan Street, South of Leeper Bridge, South Michigan Street north of Indiana Ave., Portage Ave., South of Blaine Avenue, Lincolnway West, East of Olive street; West Washington Avenue; Prairie Avenue, north of Indiana Avenue; Lincolnway East; East Jefferson Boulevard west of Eddy Street; South Bend Avenue, West of St. Louis Boulevard, North Nill Street, and Mishawaka Avenue in said City; provided it shall be lawful for said

Commercial vehicles to cross said street- and avenues and parts thereof at streets or avenue intersections.

Section III. It shall be unlawful for any person, persons, firm, co-partnership, or corporation to operate a Commercial Vehicle as defined under Section I of this ordinance on any street or avenue in the City of South Bend without first paying to the controller of the City of South Bend for each and every commercial vehicle so operated a license fee at the rate provided in Section V of said ordinance number 2135 for Commercial Vehicles defined therein. And also in addition to such license fee, an annual tax on each commercial vehicle so operated in the sum of two hundred dollars. Upon payment of such license fee and tax, the controller shall issue a license to the payer for the term of one year to operate the vehicle or vehicles covered by said license within said City and over the streets and avenues thereof except those streets and avenues and part- thereof mentioned in Section II hereof. Such license shall not be transferrable without the written consent of the controller and Chief of Police; and it shall be unlawful to operate such [fol. 32] commercial vehicle without first filing with the controller a liability contract of insurance as provided in said Ordinance number 2135 for Commercial vehicles operating in the city of South Bend.

Section IV. Any person, persons, firm, co-partnership or corporation upon conviction for the violation *or of* failure to comply with any provision of this ordinance shall be fined in any sum not more than one hundred ($100.00) dollars for each and every offense hereunder, and each day's operation in violation of any of the provisions of this ordinance shall constitute a separate offense.

Section V. If any provisions or section of this ordinance shall be held void or unconstitutional for any reason, all other provisions and sections which are not expressly held void or unconstitutional shall be and continue in full force and effect.

Section VI. This ordinance shall not repeal any of the provisions of said ordinance number 2135 *not* inconsistent herewith, but is and shall be additional to said last named ordinance.

Section VII. Ordinance Number 2208 entitled "An Ordinance Declaring Certain Streets Preferential Traffic Streets, Relating to Commercial Vehicles and Providing for License and Insurance and Penalties for Violation thereof," is hereby repealed.

Section VIII. This ordinance shall be in full force and effect from and after its passage and legal publication.

(Signed) August Bailey.

(In pencil:) Notation at foot of ordinance: Motion of 1-2-3. Bailey. Suspend Rules. Adopted.

[fol. 33] It is further stipulated and agreed as follows:

That the automobile bus operated by the defendant as aforesaid had a capacity of twelve passengers:

That said Ordinance Number 2229 was passed by the City Council of the said City of South Bend, on the 27th day of December, 1921, and was presented to the Mayor of the said City of South Bend, December 28th, 1921, and was approved and signed by the Mayor of said City, December 30th, 1921; and that the only publication thereof was in the South Bend News Times on each of the following days, namely, December 31st, 1921, and January 7th, 1922; and no other publication thereof was had; and that said South Bend News Times was a newspaper published in the English language, and of general circulation in the City of South Bend, St. Joseph County, Indiana.

It is further stipulated and agreed that the annual tax provided in Section 3 of said Ordinance number 2229 is unreasonable, and therefore void; and that no attempt has been made on the part of the City of South Bend, in reference to the defendant, to enforce the payment of said tax of $200 (Two hundred dollars), as therein provided.

It is further stipulated and agreed that the defendant's automobile bus aforesaid was at all times assessed and taxed for State, City, Township and County purposes, at the residence of the defendant, in the City of Mishawaka, Penn. Township, St. Joseph County, Indiana.

It is further stipulated and agreed that the defendant at no time made application for a license under either of said

Ordinances 2135 or 2229, and did not at the times herein [fol. 34] mentioned have or hold such license;

And that the defendant at none of the times herein mentioned took for transportation upon his said bus any passengers within the City of South Bend, for transportation to any other point within the City of South Bend;

And that at all times herein mentioned the defendant did not have within the City of South Bend any station, stations, or other stopping places belonging to himself, or any agents soliciting transportation; and that he owned no property within the City of South Bend which he used or employed in his business of transportation, except the motor bus aforesaid;

And that at the time of the passage of said Ordinance Number 2229, and at all times thereafter, there were published, printed and circulated in the said City of South Bend, two newspapers, in the English language, of general circulation, and of opposite political faith; one being the South Bend News-Times, of the Democratic faith, and the other the South Bend Tribune, of the Republican faith.

And that—all the times in the stipulated facts referred to, the defendant had a license for the bus in question, and had paid to the Secretary of State of the State of Indiana all license fees required directly by the statutes of the State.

And the parties pray the judgment of the Court upon the foregoing facts, without reference to the deficiency or insufficiency of any pleadings in this cause: it being the defendant's contention that the Ordinances aforesaid, in so far as applicable, or assumed to be made applicable to his acts, as in the Complaint set forth, are void and of no effect, [fols. 35-45] being without the power of the Common Council of the City of South Bend to enact, and in violation of the First Article of the Constitution of the State of Indiana, and the Twenty-third Section of said Article, and also in violation of the Fourteenth Amendment to the Constitution of the United States, and particularly in violation of Section Eight of Article One of the Constitution of the United States of Ameirca, being the Inter-State Commerce Clause.

And here the Plaintiff and Defendant, severally and respectively, rested their cases.

And the above and foregoing Stipulation and Agreement was all of the evidence given in the cause.

[fol. 46] IN SUPREME COURT OF INDIANA

[Title omitted]

OPINION AND JUDGMENT—October 14, 1926

"Come now the parties by counsel and the court being advised in the premises, affirms the judgment of the court below with the following opinion pronounced by

EWBANK, J.:

The question for decision in this case is the validity or invalidity of certain ordinances of the city of South Bend. The statute constituting the city charter authorizes cities "to regulate, tax and license coaches, hacks, drays, automobiles, and all other vehicles," and "to license, tax, and regulate public hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, bill-posters and all other persons pursuing like occupations for pay or hire."

Clauses 32, 38, §10,284 Burns 1926, §53 ch. 129 Acts 1905, p. 219 (252)

And the motor vehicle, registration act then provided that "No owner of a motor vehicle, except motor trucks and motor driven commercial vehicles" should be required to pay any municipal tax or license fee, in addition to the registration fee paid to the secretary of state, with a proviso that nothing in the act should be construed as affecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles used within their limits for public hire.

§10,476d Burns 1914, §17 ch. 300 Acts 1913, p. 779 (789).

[fol. 47] Ordinance No. 2135 of the appellee city, adopted January 12, 1921, reads as follows:

"Every motor vehicle and electric vehicle operated by a person * * * along and upon any public street or highway within the city of South Bend * * * for the purposes of affording a means of local street or highway transportation by indiscriminately accepting and discharging such persons as may offer themselves for transportation, either at temporary street or highway parking places or along the course or within the territory on which said vehicle is or may be running or operating * * * is hereby declared to be a commercial vehicle * * * (with exceptions as to taxicabs and hotel busses) * * *. No person * * * shall operate any such commercial vehicle, commonly known as a jitney bus, and it shall be unlawful to do so, unless there shall have been filed with the city controller of said city a liability contract of insurance issued to such person * * * by an insurance company, organized under the laws of the state of Indiana, or authorized to transact business therein, providing * * * for the payment of any final judgment that may be rendered against the insured for damages to property or bodily injury or death to others, resulting from accident or collision for which said person * * * may be liable * * * growing out of the negligent operation of such commercial vehicle, in a sum not exceeding $1,000.00 to any one person or $2,500.00 to more than one person as a result of one accident * * *. Any person * * * shall pay to the city controller for the benefit of said city, for each commercial vehicle commonly known as a jitney bus to be so driven or operated, an annual license fee as follows, to wit: * * * (b) $50.00 for a vehicle having a rated seating capacity for more than seven and not more than twelve passengers * * *. Any person * * * upon conviction for the violation or failure to comply with any provisions of this ordinance, shall be fined in any sum [fol. 48] not more than $100.00 * * *."

Without repealing this ordinance, but as supplementary thereto, the common council, on December 27, 1921, adopted another ordinance, numbered 2229, which (in part) provided as follows:

"Section 1. Every motor vehicle operated by a person * * * along and upon any public street or highway with- the city of South Bend * * * for the purpose of affording a means of street or highway transportation by indiscriminately accepting such persons as may offer themselves for transportation, from a point within the city of South Bend, to a point outside the limits * * * and from a point without to a point within the city of South Bend, is declared to be, for the purpose of this ordinance, a commercial motor vehicle for hire * * * (but excepting taxicabs and hotel busses) * * *.

"Section 3. It shall be unlawful for any person * * * to operate a commercial vehicle as defined under section one of this ordinance on any street or avenue in the city of South Bend without first paying to the controller * * * a license fee at the rate provided in section 5 of said ordinance number 2135 for commercial vehicles defined therein, * * * and it shall be unlawful to operate such commercial vehicle without first filing with the controller a liability contract of insurance as provided in said ordinance number 2135 for commercial vehicles operating in the city of South Bend.

"Section 4. Any person * * * upon conviction for the violation of or failure to comply with any provision of this ordinance shall be fined not more than $100.00 * * *."

A verified complaint by the city of South Bend alleged that on the 30th of May, 1923, "defendant, then being a resident of the said county of St. Joseph, and being at said time within the corporate limits of the said city of South Bend, did then and there operate a commercial vehicle [fol. 49] upon a public street of said city without having first obtained a license from said city so to do, contrary to sections one, two, three and four of an ordinance No. 2229 adopted by the common council of said city December 27, 1921." The evidence consisted of facts which, in addition to setting out the ordinances at length, stated the following facts: That defendant resided in St. Joseph county, Indiana, at the city of Mishawaka, which adjoins South Bend on the east; that daily for several months he oper-

ated between South Bend and Niles, in the State of Michigan, a motor bus for the transportation of passengers between those places. (It is about four and one-half miles from the north city limits of South Bend to the Michigan state line, in which distance is one village and many suburban residence, and Niles is four or five miles north of the state line.) That in the course of such transportation of passengers defendant entered within the corporate limits of the city of South Bend, "and there offered himself and his vehicle as instruments of transportation for passengers from said city of South Bend to the said city of Niles, Michigan, and all points intermediate between (them) * * * north of the state line, * * * and in the solicitation of passengers for transportation, and in making contracts of passage, stated that he was engaged in effecting transportation only between points in the State of Indiana and points in the State of Michigan, but that if passengers who were taken aboard his bus for transportation desired to leave the said bus prior to the passage from Indiana to Michigan, they were at liberty to do so, if the bus stopped * * * but they would be obliged to pay transportation to some point in Michigan * * *. That it was defendant's practice, on said day and for several months prior thereto, on making stops after leaving the city of South Bend, to permit passengers who had taken [fol. 50] passage to some point north of the state line between Indiana and Michigan, to alight from said bus, and that they did so on numerous occasions: (but that defendant did not take on his bus any passengers for transportation from one point in South Bend to another point within said city:) that said bus was at all times a vehicle meeting and conforming to the definition of a 'commercial vehicle,' as used in ordinance number 2229 * * * and that defendant, in the course of his said operations, did use the public highways within the city of South Bend. * * * That the automobile bus operated by defendant as aforesaid had a capacity of twelve passengers. * * * That defendant's said bus was assessed and taxed for state, county, township and city purposes, at the residence of the defendant * * *. That the defendant at no time made application for a license under either of said ordinances

2135 or 2229, and did not at the times herein mentioned have or hold such license * * * (but) the defendant had a license for the bus in question, and had paid to the secretary of state of the state of Indiana all license fees required directly by the statutes of the state."

The only reason suggested by appellant for insisting that the judgment appealed from was erroneous is that the ordinance alleged to have been violated *and* void. And the only reasons he has offered for attacking its validity are that (a) it undertakes to regulate and impose burdens upon the business of transporting passengers in interstate commerce, in violation of the third clause of §8, Article 1 of the Constitution of the United States; that (b) it violates the statute which forbids any city to impose taxes or license fees upon any motor vehicles, except motor trucks and motor driven commercial vehicles used for public hire within the city, and that (c) by requiring a contract of indemnity insurance to be obtained from "an insurance com-[fol. 51] pany organized under the laws of the state of Indiana, or authorized to transact business therein," it undertakes to grant privileges and immunities to one class of citizens which do not belong equally to all citizens on the same terms, in voilation of §23, Article 1 of the Constitution of Indiana, and denies to appellant the equal protection of the Laws, in violation of §1, Article XIV of the amendments to the Constitution of the United States.

Requiring an indemnity bond conditioned to pay all judgments recovered by passengers for any negligent injuries they may sustain, as a condition of doing the business of a common carrier of passengers with a "jitney bus" did not violate any provisions of the constitution, state or federal.

Ex parte Cardinal, 170 Calif., 519, 150 Pac. 348, L. R. A. 1915 F. 850.

Ex parte Sullivan, 77 Tex. Crim. Rep. 72, 178 S. W. 537, P. U. R. 1915 E. 441.

Dickey v. Davis, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915 F. 840 P. U. R. 1915 E. 93.

City of Memphis v. State ex rel., 133 Tenn, 83, 179 S. W. 631 L. R. A. 1916 B. 1151 P. U. R. 1916 A. 825, Ann. Cas. 1917 C. 1056.

Willis v. City of Fort Smith, Ark. 182 S. W. 275.
Le Blanc v. City of New Orleans, 138 La. 242, 70 So. 212.
Auto Transit Co. v. City of Ft. Worth, Tex. Civ. App., 182 S. W. 685.
Nolan v. Riechman, 225 Fed. 812.
Hazelton v. City of Atlanta, 144 Ga. 775, 87 S. E. 1043.
Huston v. Des Moines, 176 Iowa 455, 156 N. W. 883.
Commonwealth v. Thebergo, 231 Mass. 386, 121 N. E. 30.
West v. City of Asbury Park, 89 N. J. L. 402, 99 Atl. 190.
Jitney Bus Assoc. v. City of Wilkes-Barre, 256 Pa. [fol. 5] 462, 100 Atl. 954.
Ex parte Parr, 82 Tex. Crim. 525, 200 S. W. 404.
Hadfield v. Lundin, 98 Wash. 657, 168 Pac. 516, L. R. A. 1918 B. 909, Ann. Cas. 1918 C. 942.
State ex rel. v. Dillon, 82 Fla. 276, 89 So. 558, 22 A. L. R. 227, and note on page 230.
Packard v. Banton, 264 U. S. 140, 144, 68 L. Ed. 596, 44 Sup. Ct. 257.

Neither did the provision that the indemnity insurance should be obtained from a company authorized to do business in the State of Indiana make the ordinance unconstitutional. Any foregin indemnity insurance company having sufficient assets and doing a lawful business can readily become qualified to write insurance in this state (§9129 Burns 1926, §1, Ch. 156, Acts 1905, p. 454,) and it does not appear that appellant was, or could be prevented by this provision from obtaining indemnity insurance satisfactory to any state into which he might carry passengers.

Lutz v. City of New Orleans, 235 Fed. 978, affd., 237 Fed. 1018, 150 C. C. A. 654.
Puget Sound L. & P. Co. v. Grassmeyer, 102 Wash. 482, 173 Pac. 503, L. R. A. 1918 F. 469.
State v. Seattle Taxicab & T. Co., 90 Wash. 416, 156 Pac. 837.
Re Cardinal, supra.
City of Memphis v. State ex rel. supra.
Note 22 A. L. R. 233.

But even if he did receive passengers only for transportation across the state line, the use of the city streets as a place for the indiscriminate solicitation and acceptance of passengers in a jitney bus brought him within the police power of the state to license and regulate both driver and [fol. 53] vehicle by way of providing for the safety, security and general welfare of the public, so long, at least, as Congress has not legislated on the subject.

Hendricks v. Maryland, 235 U. S. 610, 622, 623; 59 L. Ed. 385, 390, 35 Sup. Ct. 142.

Kane v. New Jersey, 242 U. S. 160, 168; 61 L. Ed. 222, 37 Sup. Ct. 30.

Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 Sup. Ct. 257.

Martine v. Kozer, 11 Fed. (Ind.) 645.

And the facts that he did not have any stations or soliciting agents and did not confine his use of the streets of the city to driving on and along them in carrying interstate commerce, but went upon them with his motor vehicle and there offered the vehicle and his services generally for the use of patrons who would take passage and pay fare to a point in Michigan, using the street both for the solicitation and receipt of passengers, brought his car within the description of a "motor driven commercial vehicle" and a "motor driven commercial vehicle used within the limits (of the city) for public hire," that may be charged license fees and subjected to regulations by the city, notwithstanding the certificate of registration issued by the secretary of state.

§10476d, supra.

The judgment is affirmed.

[fols. 54 & 55] Petition for rehearing, covering 3 pages, filed November 22, 1926, omitted from this print. See opinion denying same, page 56.

[fol. 56] IN SUPREME COURT OF INDIANA

[Title omitted]

OPINION ON PETITION FOR REHEARING AND ORDER DENYING REHEARING—December 16, 1926

Come now the parties by counsel and the court being advised in the premises overrules the petition of appellant for a rehearing of the above entitled appeal, with the following opinion pronounced by Ewbank, J., which opinion is in the words and figures following, to-wit:

Because the opinion of the court does not mention certain cases cited in appellant's brief, he cites them again as being "of controlling importance in determining the questions presented," with suggestion that he is "constrained to believe the court overlooked them."

Buck v. Kuykendall, 267 U. S. 307, 45 Sup. Ct. 324, decided that a state could not, upon a determination by the State or its officers that adequate facilities for conducting interstate commerce over a certain route were already in existence, directly by statute or indirectly through the agency of an administrative board or officer, prohibit one person from using the highways of the state for the operation of a motor bus line exclusively engaged in interstate commerce, while permitting others to use the highways for the same purpose and in the same manner. The cases of George W. Bush & Sons Company v. Maloy, 267 U. S. 317, 45 Sup. Ct. 326, People v. Yahne, 195 Calif. 683, 235 Pac. 50 and McNeely v. Mayor, etc., City of Natchez, 4 Fed. (2d) 899, were decided on the authority of the Buck case, and merely held that the state had no power to prohibit [fol. 57] one person from engaging in interstate commerce upon and over the same highways for travel, under the same conditions and regulations that it was permitted to others. Michigan Public Utilities Company v. Duke, 266 U. S. 570, 45 Sup. Ct. 191, held that a company which was operating strictly as a private carrier in interstate commerce, under private contracts with a person or persons for whom it was engaged in carrying, could not be required, by reason of the fact that it operated over the public highways, to take upon itself "the onerous duties and strict lia-

bility of a common carrier, and the obligation of furnishing an indemnity bond" imposed by law on common carriers. Alpha Portland Cement Company v. Commonwealth of Massachusetts, 268 U. S. 203, 45 Sup. Ct. 477, held that a corporation whose property was all in other states, except property of the value of $573.00 used in a local agency which took orders for interstate sales, could not be made to pay an excise tax of $567.57 per year, measured by the two factors of "the proportion of the total value of capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions," shown to have been arrived at by a calculation that took into account nearly $17,000,000.00 of property, more than $1,600,000.00 of wages and salaries, almost $11,000,000.00 of gross receipts, and the fact that the wages and salaries "assignable to Massachusetts" were $11,493.38, and the gross receipts so "assignable" were $343,204.60. The court said that the payment exacted was an "excise demanded on account of interstate business," but expressly stated that "the local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed." Shafer v. Farmers Grain Company, 268 U. S. 189, 45 Sup. Ct. 481, held the North Dakota Grain Grading act to be [fols. 58-64] unconstitutional, as being expressly designed to reach and cover buying for interstate shipment, and as subjecting such buying for interstate shipment to conditions and measures of control which directly interfered with and burdened interstate commerce, and undertook to prescribe rules under which an important part of such commerce should be conducted. Barrett v. City of New York, 232 U. S. 14, 34 Sup. Ct. 203, held that the sections of the city ordinance sought to be enforced against the express company were not designed to apply to interstate commerce, but that in any event state regulations were excluded because congress had exercised its authority and provided its own scheme of regulation to secure the discharge of the public obligations which the express business involved.

The cases cited by appellant on the question of requiring an indemnity bond conditioned to pay all judgment- recovered by passengers for any negligent injury they might

sustain were decided before the case of Packard v. Banton, 264 U. S. 140, 68 L. Ed. 596, 44 Sup. Ct. 257, referred to in the original opinion, and so far as they are inconsistent with that case are not controlling. The court gave careful consideration at the original hearing to all of these cases, but had not thought it necessary to distinguish them.

The petition for rehearing is over-ruled.

[fol. 65] IN SUPREME COURT OF INDIANA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed February 28, 1927

And now comes Otis Sprout, petitioner and plaintiff in error, by Dudley M. Shively, Walter R. Arnold, Frank Gilmer and Isaac Kane Parks, his attorneys, and in connection with his petition for a writ of errors shows that in the record and proceedings, and in the rendition of the judgment and decision of the Supreme Court of the State of Indiana, — the above entitled cause, manifest error has intervened, to the prejudice of this petitioner and plaintiff in error, in this to-wit:

First. The said Supreme Court of the State of Indiana erred in holding that ordinance No. 2229 of the City of South Bend, Indiana, upon which defendant in error's action is predicated, insofar as the same is rendered or made applicable to the plaintiff in error in this cause, does not violate Section 8, article I of the Constitution of the United States, — does not in violation of said section and [fol. 66] article of said Federal Constitution, impose burdens upon the business of transporting passengers in interstate commerce.

Second. The said Supreme Court of the State of Indiana erred in holding that said ordinance No. 2229 of the City of South Bend, Indiana, assuming to regulate and govern the business of transporting passengers in interstate commerce, was constitutional and did not violate the fourteenth amendment to the constitution of the United States, and did not deprive plaintiff in error of the equal protection

of the law, notwithstanding licenses for motor vehicles were restricted to those who could obtain from insurance companies doing business and authorized to do business in the State of Indiana, policies of insurance and indemnity to protect passengers upon such motor vehicles, from any injury suffered by them by reason of the operation thereof, upon and over the highways of the State of Indiana and other states.

And by reason of each of the foregoing errors, this petitioner and plaintiff in error prays that said judgment of the Supreme Court of Indiana may be reversed, the judgment set aside, held for naught, and mandate issue to set the same aside, and take such further steps and proceedings in the matter, consistent with such annulment of the judgment of said Supreme Court of the State of Indiana, and for all other proper relief.

Dated the 28th day of February, A. D. 1927.

Dudley M. Shively, Walter R. Arnold, Frank Gilmer, Isaac Kane Parks, Attorneys for Plaintiff in Error.

[fol. 67] IN SUPREME COURT OF INDIANA

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—February 28, 1927

On reading the petition of Otis Sprout, appellant in Cause No. 24695, in the Supreme Court of Indiana, entitled Otis Sprout, appellant, vs. City of South Bend, appellee, wherein final judgment was entered on the 16th day of December, 1926, for writ of error and his assignment of errors, and upon due consideration of the record in said cause:

It is ordered that a Writ of Error be allowed from the Supreme Court of the United States to the Supreme Court of Indiana, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in ac-

cordance with law upon condition that the said petitioner and plaintiff in error, Otis Sprout, give security in the sum of five hundred dollars, that the said plaintiff in error shall prosecute said writ of error to effect, and if said plaintiff in error fail to make his plea good, shall answer to the defendant in error for all costs, and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error now presenting a bond in the sum of Five Hundred Dollars, with Isaac Kane Parks and Walter R. Arnold as sureties, it is ordered that the same be, and the same hereby is duly approved.

[fols. 68-70] In witness whereof I have hereunto set my hand this 28th day of February, 1927, in Chambers of the Supreme Court of the State of Indiana, in the State House, in the City of Indianapolis, Indiana.

Willard B. Gemmill, Chief Justice of the Supreme Court of Indiana.

Citation, in usual form, showing service on Chester R. Montgomery and Iden S. Romig, omitted in printing.

[fol. 71] IN SUPREME COURT OF INDIANA

NOTE RE WRIT OF ERROR

Be it further remembered that afterwards and on to-wit: the 19th day of March, 1927, there was filed by the plaintiff in error with the undersigned as Clerk of the Supreme Court of Indiana, in the above entitled action, the original writ of error issued by the Supreme Court of the United States on the 18th day of March, 1927, and a copy thereof for the use of the defendant in error and one for the files of my office, with proof of service thereof, which said original writ of error is returned herewith and is affixed to this transcript of record.

[fol. 72] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 73] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed March 28, 1927.

The plaintiff in error, by Dudley M. Shively, his attorney, presents the following statement of errors, upon which plaintiff in error intends to rely in the above case, and of the parts of the record which plaintiff in error makes necessary for the consideration thereof:

First. The said Supreme Court of the State of Indiana erred in holding that Ordinance No. 2229 of the City of South Bend, Indiana, upon which defendant in error's action is predicated insofar as the same is rendered or made applicable to the plaintiff in error in this cause, does not violate Section 8, Article I of the Constitution of the United States, — does not in violation of said section and article of said Federal Constitution, impose burdens upon the business of transporting passengers in interstate commerce.

Second. The said Supreme Court of the State of Indiana erred in holding that said Ordinance No. 2229 of the City of South Bend, Indiana, assuming to regulate and govern the business of transporting passengers in interstate commerce, was constitutional and did not violate the fourteenth amendment to the constitution of the United States, and did not deprive plaintiff in error of the equal protection of the law, notwithstanding licenses for motor vehicles were restricted to those who could obtain from insurance com- [fols. 74 & 75] panies doing business and authorized to do business in the State of Indiana, policies of insurance and indemnity to protect passengers upon such motor vehicles, from any injury suffered by them by reason of the operation thereof, upon and over the highways of the State of Indiana and other states.

The plaintiff in error also states that he considers the following parts of the record necessary for the consideration of the errors upon which he intends to rely, to-wit: Pages 1 to 15; then insert: "(Here follows appeal bond)" Page 18, pages 20 to 35, both inclusive, pages 46 to 58,

both inclusive, pages 65 to 68, line 10; then insert: "(Citation ordered, and here follows citation and proof of service thereof on the Mayor of the defendant in error and the attorney for the defendant in error.)" Pages 71 and 72.

Respectfully submitted.

Dudley M. Shively, Attorney for Plaintiff in Error.

To Iden S. Romig, attorney for defendant in error, above-entitled cause:

I herewith serve upon the defendant in error above named, by delivering to you, one copy of the statement of the errors upon which the plaintiff in error in the above entitled cause intends to rely, and of the parts of the record which plaintiff in error thinks necessary for consideration thereof.

Dated March 25, 1927.

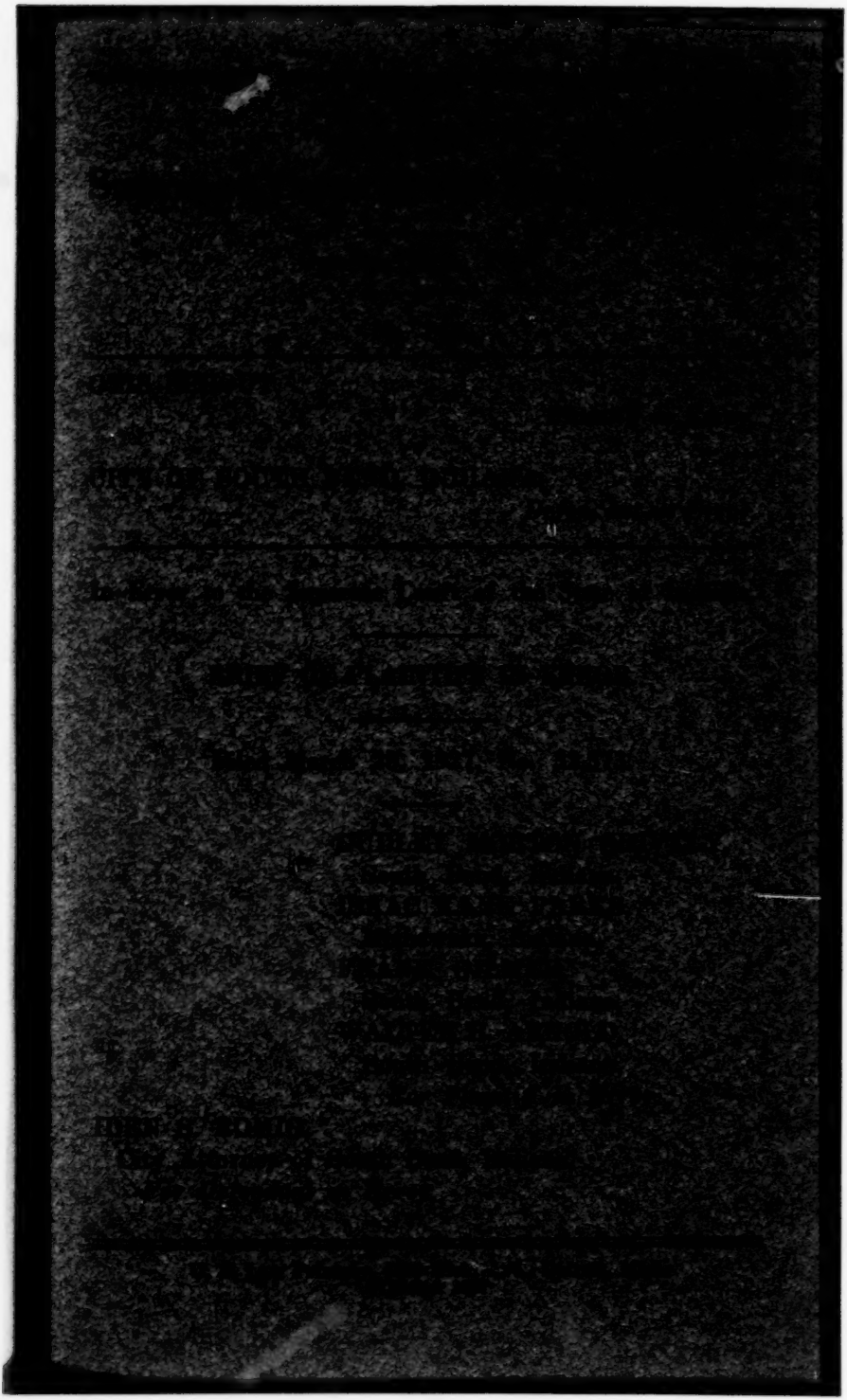
Dudley M. Shively, Attorney for Plaintiff in Error.

Service of the foregoing notice this 25th day of March, 1927, is hereby acknowledged, also service of the statement therein referred to.

Iden S. Romig, Attorney for Defendant in Error.

[fol. 76] [File endorsement omitted.]

Endorsed on cover: File No. 32,573. Indiana Supreme Court. Term No. 208. Otis Sprout, plaintiff in error, vs. City of South Bend, Indiana. Filed March 28th, 1927. File No. 32,573.



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In The
Supreme Court of the United States

October Term, 1927.

No. 208.

OTIS SPROUT,

Plaintiff in Error,

v.

CITY OF SOUTH BEND, INDIANA,

Defendant in Error.

In Error to the Supreme Court of the State of Indiana.

BRIEF OF PLAINTIFF IN ERROR.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This is a writ of error out of this court allowed by the Supreme Court of the State of Indiana to review a decision of the latter court holding that a certain ordinance, providing for licenses, designated as Ordinance

No. 2229, of the City of South Bend, Indiana, insofar as the same is applicable to the plaintiff in error, was not violative of Section 8, Article I of the Constitution of the United States; does not, in violation of said section and article, impose burdens upon the business of transporting passengers in interstate commerce, and did not, by its terms, deprive plaintiff in error of the equal protection of the laws, under Section 1 of the Fourteenth Amendment to the Constitution of the United States, notwithstanding licenses for motor vehicles engaged in interstate commerce, under said ordinance, are restricted to those who can obtain from insurance *companies authorized to do business in the state of Indiana*, policies of insurance and indemnity to protect passengers upon such motor vehicles.

The ordinance of the city of South Bend, being penal in character, an action in the city court of the city of South Bend, Indiana, was instituted against the plaintiff in error for violating the same, and he was found guilty and fined in the sum of $50.00 in the Circuit Court of St. Joseph County, Indiana, from which fine and sentence he appealed to the Supreme Court of Indiana, on constitutional grounds, raising questions under both the State and Federal Constitutions, and this writ of error is prosecuted under Section 237 of the Federal Judicial Code authorizing issuance of writs of error to the highest court of a state from a judgment upholding the validity, under the Federal Constitution, of an ordinance or statute.

STATEMENT OF THE CASE.

On January 10, 1921, the city council of South Bend, Indiana, passed, and on the 12th day of January, 1921, the mayor of said city approved an ordinance numbered 2135 (page 15 in Appendix), regulating and requiring licenses for the operation of motor vehicles used in the city of South Bend for public hire.

Section V of the ordinance provided a license fee of $50.00 for a vehicle having a rated seating capacity of more than seven, or not over twelve passengers. Section II of the Ordinance provided that before a license is issued,

> "There shall have been filed with the city controller a liability contract of insurance issued to such person, persons, firm or copartnership or corporation, by an insurance company organized under the laws of the state of Indiana, or authorized to transact business therein,"

providing for the payment of any final judgment that may be rendered against the insured for damages to property or by bodily injury or death to others resulting from accident or collision for which said persons may be liable while operating the vehicle described, in a sum not exceeding one thousand dollars to any one person, or twenty-five hundred dollars to more than one person as a result of one accident.

On the 27th day of December, 1921, the city council of the city of South Bend passed, and there was approved, an ordinance numbered 2229 (page 18 of Appendix) prohibiting the use of certain named streets by commercial vehicles, and providing for the license and taxation of commercial vehicles, and liability insur-

ance affecting vehicles transporting passengers for hire from a point within the city of South Bend, to a point outside the limits of the city of South Bend, and from a point without to a point within the city of South Bend. It rendered unlawful the operation of any such vehicles within the city of South Bend, without first obtaining a license by the payment of a license fee as provided by Section V of the previous ordinance, *supra*, "and also, in addition to such license fee, an annual tax on each commercial vehicle so operated, in the sum of two hundred dollars." And it was provided that it should be unlawful

> "to operate such commercial vehicle without first filing with the controller a liability contract of insurance as provided in said ordinance No. 2135 for commercial vehicles operating in the city of South Bend."

Section IV of this ordinance provided for a fine of not more than one hundred dollars for each and every offense, and each day's violation of any of the provisions of the ordinance, should constitute a separate offense.

Plaintiff in error was engaged, at the time of the passage of said ordinances in the transportation of passengers for hire between the city of Niles, Michigan, and the city of South Bend, Indiana, and confined his activities exclusively to interstate transportation, and all contracts for transportation were interstate in character, but he did not restrain any of his passengers from leaving his motor bus prior to reaching the destination for which they had paid. He failed to take out a license, and failed to engage liability insurance as provided for by the ordinances aforesaid. On May 30, 1923, when these ordinances were in force and effect, plaintiff in error, while so engaged in interstate transportation, was apprehended on a complaint filed by the city of

South Bend against him for violation of said ordinance, that is, for operating a commercial vehicle within the definition of said ordinance, without first having obtained a license, and without first having engaged liability insurance as therein provided. The complaint was filed in the City Court of the City of South Bend; a hearing was had, and he was fined five dollars and costs. He appealed to the St. Joseph Circuit Court, and after hearing on an agreed statement of facts as above stated he was fined in the sum of fifty dollars, and judgment entered accordingly, and from that judgment he appealed to the Supreme Court of Indiana, contending that the several ordinances in question, insofar as applicable to him and his business, were violative of the interstate commerce and equal privileges and immunities clauses of the Federal Constitution. The Supreme Court of Indiana held the ordinances did not impinge on either of these two constitutional provisions, and affirmed the lower court, and a writ of error was allowed to this court on which the case is here for review.

ARGUMENT.

The plaintiff in error is not insensible to the decisions cited by the Supreme Court of Indiana, in support of its decision (page 29 of the printed record) on the question of the right of a state or municipality to regulate the operation of traffic, even though it be confined to interstate commerce; neither has plaintiff in error overlooked the import of more recent decisions of this court in, to-wit: *Interstate Busses Corporation v. Holyoke Railway Company, 47 Sup. Ct., 298; 273 U. S., 45; Clark v. Poor, 274 U. S., ...*, but it also directs attention to the recent cases of *Mayor et al. v. McNeely, 47 Sup. Ct., 758; .... U. S., ...*, and *City of Hammond v. Schapi Bus Line, ... U. S., ...; Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company, 47 Sup. Ct., 294; .... U. S., ...;* and *DiSanto v. Commonwealth of Pennsylvania, 47 Sup. Ct., 267.*

We shall now turn to each of the several cases applicable to the subject; first, those apparently tending to uphold the decision of the Supreme Court of Indiana; secondly, those tending to uphold the contention of the plaintiff in error that the ordinance in question is void, and shall analyze each case, insofar as the subject matter here is under consideration, and endeavor to apply it to the facts in this case and show which set of decisions

should control on (a) The question of license provided as a direct burden on interstate commerce; and (b) violation of the Fourteenth Amendment in requiring, as a condition precedent to the grant of a license, the issuance to the applicant of an insurance policy *in some company of Indiana.*

(a)

Authorities Cited to Sustain the Decision.

The Supreme Court of Indiana held that under the authorities of *Hendricks v. Maryland, 235 U. S., 610; Kane v. New Jersey, 242 U. S., 160,* which that court would unquestionably have added, had the cases been decided at that time, *Interstate Busses Corporation v. Holyoke Street Ry. Company, 273 U. S., 45,* are distinguishable from the case at bar on each of the following grounds:

In *Hendricks v. Maryland, supra,* it was decided by this court, in the absence of federal legislation on the subject, it was permissible for the state to require, as a condition precedent to the operation upon its highways of motor vehicles, even though moving in interstate commerce, that registration of the vehicle be made, and that the drivers be licensed, and that states were not inhibited from charging therefor reasonable fees, graduated according to the horse power of the engines in the vehicles. The decision in *Clark v. Poor, 274 U. S., ...,* is based upon practically the identical proposition, to-wit: that the state has the power, before permitting the operation of motor vehicles over its highways, as a police regulation, to exact a permit, and, furthermore, to require the payment of some tax or fee for the use of the highway. To the same effect is *Kane v. New*

Jersey, 242 U. S., 160. These three cases may be conveniently grouped, and resolve themselves into the proposition that a state, which owns the highways, has the right to exact compliance with restrictions and regulations by users thereof *so long as such restrictions and regulations do not discriminate against interstate commerce and in favor of domestic commerce.* So far as the *Wiggins Ferry Company v. East St. Louis, 107 U. S., 365,* has any influence upon the question at bar, and we contend that it has none, it has been effectually dissipated by the case of *Mayor et al. v. McNeely, 47 Sup. Ct., 758,* which holds that a town may not consist with the commerce clause of the Federal Constitution, make its consent and license a condition precedent to the right to engage in operating a ferry from its river front across the river to a town in another state.

The only question raised and decided in the case of *Martine v. Kozer, 11 Fed. (Second Series), 645,* was that the exaction by a state of an annual license fee for motor vehicles was not in violation of the Federal provisions of the Rural Post Roads Act, providing that roads established under its provisions should be free from tolls of all kinds, and does not decide or have any bearing or influence upon the questions at bar.

In the case of *Interstate Busses Corporation v. Holyoke Street Railway Company, supra,* this court held that where a carrier is doing both an interstate and intrastate business, he has the burden of showing that a license requirement *(under state authority)* to do intrastate business operates to prejudice interstate business. That was not a case of an *exclusive interstate business* as there is in the case under consideration. The court there specifically held:

"No licenses from local authorities or certifi-

> cate of public convenience and necessity is required in respect of transportation that is exclusively interstate."

It will be noted that in not a single case of those above analyzed (and we apprehend they are all the federal decisions that can be urged to sustain the decision of the Supreme Court of Indiana) was it held permissible for a *municipality* within a state to exact a license upon an interstate carrier in respect of its business or the operation by it of vehicles upon the public highways of a *state*. The cases treated recognize the right of the several *states* to regulate traffic and impose restrictions on the use of *its* highways even to the extent of compelling the user to pay a fee therefor—if not discriminatory as between interstate and intrastate commerce.

Possibly it could be held valid for a municipality to exact a similar *use* tax; but the license ordinance in question is patently not revenue legislation, but obviously designed to restrict, and to some extent *prohibit*, the carriage of passengers for hire from without to within the city except by means of taxicabs and interurban railroads (Appendix, page 18), which may operate without regard to the ordinance. Besides, the municipality has not the ownership of the streets and highways within the city. They belong to the state.

> *Falender v. Atkins, 186 Ind., 455; 114 N. E., 965.*
> *City of Gary v. Much, 180 Ind., 26; 101 N. E., 4.*
> *Grand Trunk v. City of South Bend, 174 Ind., 203; 89 N. E., 885.*

Moreover, it is established law in the state of Indiana that when a city provides for a license tax or other exaction to be paid as a condition precedent to the operation of vehicles over highways within the munici-

pality, it exercises the *police power*, and not the taxing power.

> *Tomlinson v. City of Indianapolis, 144 Ind., 142; 43 N. E., 9; 36 L. R. A., 413.*

Cases Opposed to the Decision.

On the other hand, the case of *Wm. N. Barrett v. City of New York et al., 232 U. S., 14; 34 Sup. Ct., 203,* appears to us exactly in point and diametrically opposed to the decision of the Supreme Court of Indiana. And, it occurs to us, the Supreme Court of Indiana has not successfully overcome the force of the decisions of like tenor of this court, viz:

> *Buck v. Kuykendall, 267 U. S., 307; 45 Sup. Ct., 324.*
>
> *George W. Bush & Sons Company v. Maloy, 267 U. S., 317; 45 Sup. Ct., 326.*
>
> *Michigan Public Utilities Company v. Duke, 266 U. S., 570; 45 Sup., Ct., 191.*

And the later cases of:

> *Mayor et al. v. McNelly, 47 Sup. Ct., 758.*
>
> *City of Hammond v. Schapi Bus Line (U. S.).*
>
> *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company, 47 Sup. Ct., 294,* and
>
> *DiSanto v. Commonwealth of Pennsylvania, 47 Sup. Ct., 267.*

If the ordinance be held valid as not a burden on interstate commerce, then a like ordinance in the state of Michigan would be upheld on the same principle. Result: Every city and village through which an exclusively interstate carrier would be obliged to effect a

passage from Grand Rapids, Michigan, to Indianapolis, Indiana, could make similar exactions. Each of the several municipalities in Michigan through which the carrier must go: Grand Rapids, Moline, Wayland, Bradley, Shelbyville, Martin, Plainwell, Cooper, Kalamazoo, Oshtemo, Mattawan, Paw Paw, Decatur, Dowagiac, Pokagon, Niles, and in Indiana: Roseland, South Bend, Lakeville, Lapaz, Plymouth, Argos, Rochester, Mexico, Peru, Bennett's Switch, Kokomo, Goldsmith, Westfield, Carmel, Nora, Broad Ripple and Indianapolis, each and all, could make a like exaction! Thirty-three municipal corporations each compelling the payment of a $50.00 annual license fee (to say nothing of the $200.00 tax) a total of $1650.00 for the privilege of making, say, only two trips a month between the city of Grand Rapids, Michigan, and the city of Indianapolis, Indiana! And if the trip be extended further, into Kentucky, proportionately more. We contend it was precisely to avert such unconscionable practices that the interstate commerce clause was written into our constitution. It was inserted to prevent a throttling of intercourse from one state to another by burdensome restrictions and legislative exactions which were apt to partake of the character of tribute for safe conduct, similar to that once paid to tribal chieftains in the Afro-Mediterranean States.

Besides leaving each [redacted], town and city to exact such tribute, nothing was to prevent each village, town and city—under the holding of the Indiana Supreme Court—to require of such carrier, before engaging in carriage, of passengers in interstate commerce, where his course took him through their several environs, that he take out insurance in companies of Indiana having a certain amount of reserve or paid up capital stock, or having at least three of its officers, residents of the

state, etc., etc. No end of qualifications and specifications touching the companies in which the insurance must be taken before the issuance of a license can be made by the several municipalities. Each is at liberty to make requirements entirely inconsistent with all the others in respect of insurance. The municipalities of the state of Michigan (and of the state of Kentucky, if the course of carriage be extended to that state) would, naturally, not be content with a policy of insurance written in some corporation of *Indiana*. They would be derelict to their patriotism if they did not insist that the company in which the insurance was to be taken should be some company formed and existing under the laws of *their* respective states, or authorized therein to do business. And defendant in error claims all this does not constitute any burden on interstate commerce!

The Fourteenth Amendment Is Violated.

(b)

The Indiana Supreme Court holds the insurance provision—which it will be observed is a condition precedent to issuance of a license—constitutional, notwithstanding insurance be "by an insurance company, organized under the laws of the state of Indiana or authorized to transact business therein" (Record, page 28), because:

> "Any foreign indemnity insurance company having sufficient assets and doing a lawful business can readily become qualified to write insurance in this state, and it does not appear that appellant was, or could be prevented by this provision from obtaining indemnity insurance satisfactory to any state into which he might carry passengers."

But the proposition remains that every insurance company has the unqualified right to accept or reject the plaintiff in error as a risk, at its own pleasure, thus rendering his right to engage in interstate commerce to depend wholly upon their caprice.

Geo. Bolin Company v. North Platte Valley Irrigation District, 121 Pac., 22.

The cases cited in justification of this provision of the ordinance are all cases affecting the right to exercise a local or intrastate privilege, none appertain to the right to engage in interstate commerce.

CONCLUSION.

We respectfully submit that the requirements of the ordinance under consideration, insofar as the same are sought to be made applicable to plaintiff in error in his business exclusively interstate in character, are unconstitutional and void as herein pointed out, and that the judgment of the Indiana Supreme Court should be in all things reversed, for which action of this court plaintiff in error respectfully prays.

DUDLEY MORTON SHIVELY,
South Bend, Indiana,
ISAAC KANE PARKS,
Mishawaka, Indiana,
FRANK GILMER,
South Bend, Indiana,
WALTER R. ARNOLD,
South Bend, Indiana,
Attorneys for Plaintiff in Error.

APPENDIX.

The material parts of Ordinance Number 2135 of the said city of South Bend are as follows:

ORDINANCE NO. 2135.

An ordinance regulating and requiring licenses for the operation of motor vehicles used in the city of South Bend, state of Indiana, for public hire and providing for revocation of the licenses therefor and penalties for the violation thereof, be it ordained by the common council of the city of South Bend, Indiana, that:

Section 1. Every motor vehicle and electric vehicle operated by a person or persons, firm, copartnership or corporation, along and upon any public street or highway within the city of South Bend, state of Indiana, for the purposes of affording a means of local street or highway transportation by indiscriminately accepting and discharging such persons as may offer themselves for transportation, either at temporary street or highway parking places or along the course or within the territory on which said vehicle is or may be running or operating or that may be operated for the transportation of passengers from place to place in or about said city, from any street curb, alley or highway either upon call or otherwise, from such is hereby declared to be a commercial vehicle for hire and hereinafter referred to as "commercial vehicles" provided, however this ordinance shall not include nor apply to motor vehicles known as "taxicabs" operated only upon call by a special contract of hire, and operated only from a garage or railroad depot or regular stand and stationed at all times when not in operation at a garage or railroad depot, or to busses or to motor vehicles owned

and operated by hotel companies or hotel proprietors, between their hotels and depots for their exclusive use and benefit in conveying their guests to and from the same.

Section 2. No person, firm, copartnership or corporation shall operate any such commercial vehicle commonly known as a jitney bus and it shall be unlawful to do so, unless there shall have been filed with the city controller of said city a liability contract of insurance issued to such person, persons, firm, copartnership or corporation, by an insurance company, organized under the laws of the state of Indiana, or authorized to transact business therein providing, among other things, for the payment of any final judgment that may be rendered against the insured for damages to property or by bodily injury or death to others, resulting from accident or collision for which said person, persons, copartnership, firm or corporation may be liable, while operating the commercial vehicles described therein within the provisions hereof by reason of and growing out of the negligent operation of such commercial vehicle, in a sum not exceeding one thousand ($1000.00) dollars to any one person or twenty-five hundred ($2500.00) dollars to more than one person as a result of one accident.

It shall be the duty of every person, persons, firm, copartnership or corporation to keep such insurance in force during the full period of time for which he, they or it may be operating hereunder and in case said policy contract of insurance is canceled, said city shall be notified, and if said policy of insurance be canceled, such commercial vehicles shall not be operated until a policy of insurance meeting the requirements of this section shall have been filed. No cancellation of any such policy of insurance shall affect any liability incurred. Any license issued or hereinafter provided shall

become void, if the contract of insurance shall for any reason be canceled or be allowed to lapse.

AMOUNT OF LICENSE.

Section 5. Any person, persons, firm, copartnership or corporation desiring to obtain a license hereunder, shall pay to the city controller for the benefit of said city, for each commercial vehicle commonly known as a jitney bus to be so driven or operated, an annual license fee as follows, to-wit:

(Fol. 25) (a) $25.00 for a vehicle having a rated seating capacity for five passengers or less.

(b) $35.00 for a vehicle having a rated seating capacity for more than five and not more than seven passengers.

(c) $50.00 for a vehicle having a rated seating capacity of more than seven or not over twelve passengers.

(d) $75.00 for a vehicle having a rated seating capacity for more than twelve passengers.

Provided, that the foregoing license fee shall not apply to commercial vehicles which are operated under the terms of any contract entered into by the owner thereof with the Board of Public Works, and ratified by the common council and which are operated regularly under a regular time schedule. And provided further that the license fees for such vehicles so operated under such contract and which have a rated seating capacity of more than twelve passengers shall be $50.00 per year. Provided also that no license is required for vehicles held in reserve for the purpose of substituting while vehicles on which a license has been issued, are being repaired, in which the license tag on the vehicle for which a license has been issued, and which

is being repaired may be transferred temporarily to such reserve vehicle while it is being used as a substitute for the regular vehicle.

The material parts of Ordinance Number 2229 of the city of South Bend, are as follows:

ORDINANCE NO. 2229.

An ordinance prohibiting the use of certain named streets and avenues by commercial vehicles and providing for the license and tax for commercial vehicles and liability insurance and providing penalties for violations and the repeal of Ordinance Number 2208.

Be it ordained by the common council of the city of South Bend, Indiana, that:

Section 1. Every motor vehicle operated by a person or persons, firm, corporation or copartnership along and upon any public street, or highway, within the city of South Bend, state of Indiana, for the purpose of affording a means of street or highway transportation by indiscriminately accepting such persons as may offer themselves for transportation, from a point within the city of South Bend to a point outside the limits of the city of South Bend, and from a point without to a point within the city of South Bend, is hereby declared to be, for the purpose of this ordinance, a commercial motor vehicle for hire; provided, however, this ordinance shall not include or apply to a street or interurban railway cars or motor vehicles known as "taxicabs" operated only upon call by a special contract of hire, and operated only from a garage railroad station or regular stand, and stationed at all times when not in operation, at a garage, railroad depot or regular stand, or to busses, or motor vehicles owned by hotel companies, or hotel proprietors, between their hotels and depots, for their exclusive use and benefit, in conveying their guests to and from the same.

Section II. It shall be unlawful for any person, persons, firm, copartnership or corporation to operate or cause to be operated either any commercial vehicles as defined hereinbefore or any commercial vehicles defined in Section I of Ordinance Number 2135 entitled, "An Ordinance regulating and requiring licenses for the operation of motor vehicles used in the city of South Bend, Indiana, for public hire and providing for revocation of the license therefor and penalties for the violation thereof," on any or either of the following named improved streets or avenues in the said city of South Bend, Indiana, to-wit: North Michigan street, south of Lepeer Bridge, South Michigan street, north of Indiana avenue, portage avenue, south of Blaine avenue, Lincolnway West, east of Olive street, West Washington avenue, Prairie avenue, north of Indiana avenue, Lincolnway east, East Jefferson boulevard west of Eddy street, South Bend avenue, west of St. Louis boulevard, North Hill street and Mishawaka avenue in said city; provided it shall be lawful for said commercial vehicles to cross said street and avenues and parts thereof at streets or avenue intersections.

Section III. It shall be unlawful for any person, persons, firm, copartnership or corporation to operate a commercial vehicle as defined under Section I of this ordinance on any street or avenue in the city of South Bend without first paying to the controller of the city of South Bend for each and every commercial vehicle so operated a license fee at the rate provided in Section V of said Ordinance Number 2135 for Commercial Vehicles defined therein. And also in addition to such license fee, an annual tax on each commercial vehicle so operated in the sum of two hundred dollars. Upon payment of such license fee and tax, the controller shall issue a license to the payer for the term of one year to operate the vehicle or vehicles covered by said

license within said city and over the streets and avenues thereof except those streets and avenues and part hereof mentioned in Section II hereof. Such license shall not be transferable without the written consent of the controller and chief of police; and it shall be unlawful to operate such commercial vehicle without first filing with the controller a liability contract of insurance as provided in said Ordinance Number 2135 for Commercial Vehicles operating in the city of South Bend.

Section IV. Any person, persons, firm, copartnership or corporation upon conviction for the violation or on failure to comply with any provision of this ordinance shall be fined in any sum not more than one hundred ($100.00) dollars for each and every offense hereunder, and each day's operation in violation of any of the provisions of this ordinance shall constitute a separate offense.

Section V. If any provisions or section of this ordinance shall be held void or unconstitutional for any reason, all other provisions and sections which are not expressly held void or unconstitutional shall be and continue in full force and effect.

Section VI. This ordinance shall not repeal any of the provisions of said Ordinance Number 2135 inconsistent herewith, but is and shall be additional to said last named ordinance.

Section VII. Ordinance Number 2208 entitled "An Ordinance declaring certain streets preferential traffic streets, relating to commercial vehicles and providing for license and insurance and penalties for violation thereof," is hereby repealed.

Section VIII. This ordinance shall be in full force and effect from and after its passage and legal publication.

(Signed) August Bailey.

Office Supreme Court, U.S.
FILED
JAN 16 1928
PIERCE ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

October Term, 1927
No. 208

OTIS SPROUT,
Plaintiff in Error,

V.

CITY OF SOUTH BEND, INDIANA,
Defendant in Error.

In Error to the Supreme Court of the State of Indiana

BRIEF OF DEFENDANT IN ERROR

Filed March 28, 1927
No. 32,573

IDEN S. ROMIG,
City Attorney of South Bend, Indiana,
For Defendant in Error.

DUDLEY MORTON SHIVELY,
South Bend, Indiana.

ISAAC KANE PARKS,
Mishawaka, Indiana.

FRANK GILMER,
South Bend, Indiana.

WALTER R. ARNOLD,
South Bend, Indiana.
For Plaintiff in Error.

In the Supreme Court of the United States

October Term, 1927
No. 208

OTIS SPROUT,
Plaintiff in Error,

V.

CITY OF SOUTH BEND, INDIANA,
Defendant in Error.

In Error to the Supreme Court of the State of Indiana

BRIEF OF DEFENDANT IN ERROR

NATURE OF THE ACTION

The ~~Defendant~~ Plaintiff in Error was tried in the City Court of the City of South Bend, St. Joseph County, Indiana, for the violation of an Ordinance forbidding any person to operate a motor vehicle upon the public streets of the city of South Bend for the purpose of affording a means of transportation for hire by indiscriminately accepting persons for transportation from a point within the city of South Bend to a point outside the limits of the city of South Bend, and visa versa, without first paying to the Controller of said city of South Bend for each vehicle so operated, a license fee and filing at the same time with the Controller, a lia-

bility contract of insurance providing for the payment of any final judgment that may be rendered against the insured for damages to property or for bodily injury or death to others resulting from accidents or collisions for which said person may be liable while so operating said vehicle.

Judgment was entered for the City of South Bend and against the Plaintiff in Error, Otis Sprout, in the City Court of said City in the sum of Five Dollars ($5.00) and costs and from this judgment said Sprout appealed to the Circuit Court of said St. Joseph County, where the cause was tried de novo upon the original pleadings and an additional affirmative answer of said Sprout and judgment was there entered for said City and against said Plaintiff in Error in the sum of Fifty Dollars ($50.00) and costs. From this judgment said Plaintiff in Error appealed to the Supreme Court of the State of Indiana, where the judgment of the Circuit Court of said St. Joseph County was affirmed.

The opinion of the said Supreme Court of the State of Indiana,, in deciding this cause and affirming said judgment of the said Circuit Court, and in which opinion are recited further facts relating to said cause is shown in the printed report thereof, in 153 North Eastern Reporter, Page 504, and are as follows:

"The question for decision in this case is the validity or invalidity of certain ordinances of the city of South Bend. The statute constituting the city charter authorizes cities "to regulate, tax and license coaches, hacks, drays, automobiles and all other vehicles," and "to license, tax and regulate public hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, bill-posters and all other persons pursuing like occupations for pay or hire." Clauses 32, 38, Sec. 10284, Burns' 1926 (section 53, c. 129, Acts 1905,

pp. 219, 252) And the Motor Vehicle Registration Act then provided that "no owner of a motor vehicle, except motor trucks and motor driven commercial vehicles" should be required to pay any municipal tax or license fee, in addition to the registration fee paid to the secretary of state, with a proviso that nothing in the act should be construed as affecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles used within their limits for public hire, Section 10476d, Burns' 1914 (section 17, c. 300. Acts 1913, pp. 779, 789).

Ordinance No. 2135 of the appellee city adopted January 12, 1921, reads as follows:

"Every motor vehicle and electric vehicle operated by a person * * * along and upon any public street or highway within the city of South Bend * * * for the purposes of affording a means of local street or highway transportation by indiscriminately accepting and discharging such persons as may offer themselves for transportation, either at temporary street or highway parking places or along the course or within the territory on which said vehicle is or may be running or operating * * * is hereby declared to be a commercial vehicle (with exceptions as to taxicabs and hotel busses). * * * No person * * * shall operate any such commercial vehicle, commonly known as a jitney bus, and it shall be unlawful to do so, unless there shall have been filed with the city controller of said city a liability contract of insurance issued to such person * * *, by an insurance company, organized under the laws of the state of Indiana or authorized to transact business therein, providing * * * for the payment of any final judgment that may be rendered against the insured for damages to property or bodily injury or death to

others, resulting from accident or collision for which said person * * * may be liable * * * growing out of the negligent operation of such commercial vehicle, in a sum not exceeding $1,000.00 to any one person or $2,-500.00 to more than one person as a result of one person as a result of one accident * * * Any person * * * shall pay to the city controller for the benefit of said city, for each commercial vehicle commonly known as a jitney bus to be so driven or operated, an annual license fee as follows, to-wit: * * * (b) $50.00 for a vehicle having a rated seating capacity for more than seven and not more than twelve passengers * * * Any person * * * upon conviction for the violation or failure to comply with any provisions of this ordinance, shall be fined in any sum not more than $100.000. * * *"

Without repealing this ordinance, but as supplementary thereto, the common council, on December 27, 1921, adopted another ordinance, numbered 2229, which (in part) provided as follows:

"Section 1. Every motor vehicle operated by a person * * * along and upon any public street or highway within the city of South Bend * * * for the purpose of affording a means of street or highway transportation by indiscriminately accepting such persons as may offer themselves for transportation, from a point within the City of South Bend to a point outside the limits, * * * and from a point without to a point within the city of South Bend, is declared to be, for the purpose of this ordinance, a commercial motor vehicle for hire (but excepting taxicabs and hotel busses). * * * Section 3. It shall be unlawful for any person * * * to operate a commercial vehicle as defined under section one of this ordinance on any street or avenue in the city of South Bend without first paying to the controller * * * a license fee at the rate provided in section 5 of said

ordinance number 2135 for commercial vehicles defined therein * * * and it shall be unlawful to operate such commercial vehicle without first filing with the controller a liability contract of insurance as provided in said ordinance number 2135 for commercial vehicles operating in the city of South Bend. Section 4. Any person * * * upon conviction for the violation of or failure to comply with any provision of this ordinance shall be fined not more than $100.00. * * *"

A verified complaint by the city of South Bend alleged that on the 30th day of May, 1923, "defendant, then being a resident of the said county of St. Joseph, and being at said time within the corporate limits of the said city of South Bend, did then and there operate a commercial vehicle upon a public street of said city without having first obtained a license from said city so to do, contrary to sections 1, 2, 3, and 4 of an Ordinance No. 2229, adopted by the common council of said city, December 27, 1921." The evidence consisted of a stipulation of facts which, in addition to setting out the ordinance at length, stated the following facts: That defendant resided in St. Joseph County, Ind., at the city of Mishawaka, which adjoins South Bend on the east. That daily for several months he operated between South Bend and Niles, in the State of Michigan, a motorbus for the transportation of passengers between those places (it is about four and one-half miles from the north city limits of South Bend to the Michigan state line, in which distance is one village and many suburban residences, and Niles is four or five miles north of the state line); that in the course of such transportation of passengers defendant entered within the corporate limits of the city of South Bend, "and there offered himself and his vehicle as instruments of transportation for passengers from said city of South

Bend to the said city of Niles, Mich., and all points intermediate between (them) * * * north of the state line, * * * and in the solicitation of passengers for transportation, and in making contracts of passage, stated that he was engaged in effecting transportation only between points in the state of Indiana and points in the state of Michigan, but that, if passengers were taken aboard his bus for transportation desired to leave the said bus prior to the passage from Indiana to Michigan, they were at liberty to do so, if the bus stopped, * * * but they would be obliged to pay transportation to some point in Michigan; * * * that it was defendant's practice, on said day and for several months prior thereto, on making stops after leaving the city of South Bend, to permit passengers who had taken passage to some point north of the state line between Indiana and Michigan to alight from said bus, and that they did so on numerous occasions (but that defendant did not take on his bus any passengers for transportation from one point in South Bend to another point within said city); that said bus was at all times a vehicle meeting and conforming to the definition of a 'commercial vehicle,' as used in Ordinance No. 2229, * * * and that defendant, in the course of his said operations, did use the public highways within the city of South Bend; * * * that the automobile bus operated by defendant as aforesaid had a capacity of twelve passengers; * * * that defendant's said bus was assessed and taxed for state, county, township, and city purposes, at the residence of the defendant; * * * that the defendant at no time made application for a license under either of said Ordinances 2135 or 2229, and did not at the times herein mentioned have or hold such license * * * (but) the defendant had a license for the bus in question, and had paid to the secretary of state

of the state of Indiana all license fees required directly by the statutes of the state."

The only reason suggested by appellant for insisting that the judgment appealed from was erroneous is that the ordinance alleged to have been violated and void. And the only reasons he has offered for attacking its validity are that (a) it undertakes to regulate and impose burdens upon the business of transporting passengers in interstate commerce, in violation of the third clause of section 8, article 1, of the Constitution of the United States; that (b) it violates the statute, which forbids any city to impose taxes or license fees upon any motor vehicles, except motor trucks and motor-driven commercial vehicles used for public hire within the city; and that (c) by requiring a contract of indemnity insurance to be obtained from "an insurance company organized under the laws of the state of Indiana, or authorized to transact business therein," it undertakes to grant privileges and immunities to one class of citizens which do not belong equally to all citizens on the same terms in violation of section 23, article 1, of the Constitution of Indiana, and denies to appellant the equal protection of the laws, in violation of section 1, article 14, of the Amendments to the Constitution of the United States.

(1) Requiring an indemnity bond conditional to pay all judgments recovered by passengers for any negligent injuries they may sustain, as a condition of doing the business of a common carrier of passengers with a "jitney bus," did not violate any provisions of the Constitution, state or federal. Ex parte Cardinal, 170 Cal. 519, 150 P. 348, L. R. A. 1915F, 850, P. U. R. 1915E, 282; Ex parte Sullivan, 77 Tex. Cr. R. 72, 178 S. W. 537, P. U. R. 1915E, 441; Ex parte Dickey, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840 P. U. R. 1915E, 93;

City of Memphis v. State ex rel., 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916B, 1151, Ann. Cas. 1917C, 1056, P. U. R. 1916 A, 825; Willis v. City of Fort Smith, Ark. 121 Ark. 606, 182 S. W. 275; LeBlanc v. City of New Orleans, 138 La. 243, 70 So. 212; Auto Transit Co. v. City of Fort Worth (Tex. Civ. App.) 182 S. W. 685; Nolen v. Riechman (D. C.) 225 F. 812; Hazelton v. City of Atlanta, 144 Ga. 775, 87 S. E. 1043; Huston v. Des Moines, 176 Iowa, 455, 156 N. W. 883; Commonwealth v. Theberge, 231 Mass. 386, 121 N. E. 30; West v. City of Asbury Park, 89 N. J. Law, 402, 99 A. 190; Jitney Bus Asso. v. City of Wilkes-Barre, 256 Pa. 462, 100 A. 954; Ex parte Parr, 82 Tex. Cr. R. 525, 200 S. W. 404; Hadfield v. Lundin, 98 Wash. 657, 168 P. 516, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942; State ex rel v. Dillon, 82 Fla. 276, 89 So. 558, 22 A. L. R. 227, and note on page 230; Packard v. Banton, 264 U. S. 140, 44 S. Ct. 257, 68 L. Ed. 596.

(2) Neither did the provision that the indemnity insurance should be obtained from a company authorized to do business in the state of Indiana make the ordinance unconstitutional. Any foreign indemnity insurance company having sufficient assets and doing a lawful business can readily become qualified to write insurance in this state (section 9129, Burns' 1926 (Section 1, c. 156, Acts 1905, p. 454), and it does not appear that appellant was or could be prevented by this provision from obtaining indemnity insurance satisfactory to any other state into which he might carry passengers. Lutz v. City of New Orleans (D. C.) 235 F. 978 affirmed, 237 F. 1018, 150 C. C. A.654; Puget Sound L. & P. Co. v. Grassmeyer, 102 Wash. 482, 173 P. 504, L. R. A. 1918F, 469; State v. Seattle Taxicab & T. Co., 90 Wash. 416, 156 P. 837; Ex parte Cardinal supra; City of Memphis v. State ex rel., supra; note, 22 A. L. R. 233.

(3) But, even if he did receive passengers only for the transportation across the state line, the use of the city streets as a place for the indiscriminate solicitation and acceptance of passengers in a jitney bus brought him within the police power of the state to license and regulate both driver and vehicle by way of providing for the safety, security, and general welfare of the public, so long, at least, as Congress has not legislated on the subject. Hendricks v. Maryland, 235 U. S. 610, 622, 623, 35 S. Ct. 142, 59 L. Ed. 385, 390; Kane v. New Jersey, 242 U. S. 160, 168, 37 S. Ct. 30, 61 L. Ed. 222; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 2 S. Ct. 257, 27 L. Ed. 419; Martine v. Kozer (D. C. Or.) 11 F. (2d) 645.

(4) And the facts that he did not have any stations or soliciting agents and did not confine his use of the streets of the city to driving on and along them in carrying interstate commerce, but went upon them them with his motor vehicle, and there offered the vehicle and his services generally for the use of patrons who would take passage and pay fare to a point in Michigan using the street both for the solicitation and receipt of passengers brought his car within the description of a "motor driven commercial vehicle" and a "motor driven commercial vehicle used within the limits (of the city) for public hire," that may be charged license fees and subjected to regulations by the city, notwithstanding the certificate of registration issued by the secretary of state. Section 10476d, supra.

The judgment is affirmed."

Upon motion for rehearing duly made by the Plaintiff in Error, to the Supreme Court of the State of Indiana, the said Supreme Court again rendered an opinion affirming its former opinion as above given, which opinion is shown in the printed report thereof

in 154 North Eastern Reporter on Page 369 and is as follows:

"Because the opinion of the court does not mention certain cases cited in appellant's brief, he cites them again as being "of controlling importance in determining the questions presented," with the suggestion that he is "constrained to believe the court overlooked them."

(1) Buck v. Kuykendall, 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286, decided that a state could not, upon a determination by the state or its officers that adequate facilities for conducting interstate commerce over a certain route were already in existence, directly by statute or indirectly through the agency of an administrative board or officer prohibit one person from using the highways of the state for the operation of a motorbus line exclusively engaged in interstate commerce, while permitting others to use the highways for the same purpose and in the same manner. The cases of George W. Bush & Sons Co., v. Maloy, 267 U. S. 317, 45 S. Ct. 326, 327, 69 L. Ed. 627, People v. Yahne 195 Cal. 683, 235 P. 50, and McNeely v. Mayor, etc., City of Natchez (C. C. A.) 4 F. (2d) 899, were decided on the authority of the Buck Case, and merely held that the state had no power to prohibit one person from engaging in interstate commerce upon and over the same highways for travel, under the same conditions and regulations that it has permitted to others.

Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed. 445, 36 A. L. R. 1105, held that a company which was operating strictly as a private carrier in interstate commerce, under private contracts with a person or persons for whom it was engaged in carrying, could not be required by reason of the fact that it operated over the public highways, to

take upon itself "the onerous duties and strict liability of a common carrier and the obligation of furnishing such indemnity bond" imposed by law on common carriers. Alpha Portland Cement Co. v. Commonwealth of Massachusetts, 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 916, 44 A. L. R. 1219, held that a corporation whose property was all in other states, except property of the value of $573 used in a local agency which took orders for interstate sales, could not be made to pay an excise tax of $567.57 per year, measured by the two factors of "the proportion of the total value of capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions," shown to have been arrived at by a calculation that took into account nearly $17,000,000 of property, more than $1,600,000 of wages and salaries, almost $11,000,000 of gross receipts, and the fact that the wages and salaries "as signable to Massachusetts" were $11,493.38, and the gross receipts so "assignable" were $343,204.60. The court said that the payment exacted was an "excise demanded on account of interstate business," but expressly stated that "the local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed," Shafer v. Farmers' Grain Co., 268 U. S. 189, 45 S. Ct. 481, 69 L. Ed. 909, held the North Dakota Grain Grading Act (Laws 1923, p. 549), to be unconstitutional, as being expressly designed to reach and cover buying for interstate shipment, and as subjecting such buying for interstate shipment to conditions and measures of control which directly interfered with and burdened interstate commerce, and undertook to prescribe rules under which an important part of such commerce should be conducted. Barrett v. City of New York, 232 U. S. 14, 34 S. Ct. 203, 59 L. Ed. 483, held that the sections of the city or-

dinance sought to be enforced against the express company were not designed to apply to interstate commerce, but that in any event state regulations were excluded because Congress had exercised its authority and provided its own scheme of regulation to secure the discharge of the public obligations which the express business involved.

(2) The cases cited by appellant on the question of requiring an indemnity bond conditional to pay all judgment recovered by passengers for any negligent injury they might sustain were decided before the case of Packard v. Banton, 264 U. S. 140, 44 S. Ct. 257, 68 L. Ed. 596, referred to in the original opinion, and so far as they are inconsistent with that case are not controlling. The court gave careful consideration at the original hearing to all of these cases, but had not thought it necessary to distinguish them.

The petition for rehearing is overruled."

Counsel for Defendant in Error cite cases on Page 11 of his brief and say, "And, it occurs to us the Supreme Court of Indiana had not successfully overcome the force of decisions of like tenor of this Court." Some of these cases were cited by the Supreme Court of Indiana in its decision hereinabove given and the holding of such cases was therein set out by the Supreme Court of Indiana. We respectfully submit that said cases are in harmony with the decision of the Supreme Court of Indiana, and that it is not necessary in this brief to again cite or to comment further upon them.

Counsel for Defendant in Error also cite Mayor, et al. v. McNeely, 47 Sup. Ct. 758 and say that it effectually removes or nullifies all the powers of Wiggins Ferry Company v. East St. Louis, 107 U. S. 365. We think a careful perusal of Mayor, et al. v. McNeely shows that such was not the intention of the Court.

The Court there stated, "Congress has adopted some measures to promote the safety of this form of transportation (Rev. stat. Section 4233 Rule 7, and Section 4426) (Comp. St. Section 7949, 8187) and also a measure regulating rates of ferries operated in connection with railroads (New York Central R. R. Co. v. Board of Chosen Freeholders of Hudson County, 227 U. S. 248, 263, 33 S. Ct. 269, 57 L. Ed. 499.)

But while holding that such interstate transportation is subject to congressional regulation this Court always has recognized that ferries operated across boundary waters between states simply as a means of transit from shore to shore should be termed instruments of local conveyance and subject to local regulation, to the extent that in the absence of congressional action, each state may act with respect to the ferriage from its shore."

This case further differs from the case at bar in that the ferry extended only to the border of the city of Vidalia, La., while in the cause at bar, the ~~Defendant~~ Plaintiff in Error was using the streets, alleys and public places of the City of South Bend, Indiana, indiscriminately and at his own discretion. Further, that decision read in the light of the facts really shows a discrimination against McNeely.

The State or local subdivision thereof has concurrent jurisdiction with Congress over subjects of interstate commerce which are local in character and do not require uniform regulation through the United States and until Congress acts upon such a subject the State is free to regulate it.

Cooley vs. Board of Wardens, 12 How. 310, 13 Law Ed. 996.
Escanaba & Co., vs. Chicago, 107 U. S. 678.

County of Mobile vs. Kimball 102 U. S. 691 26 Law Ed. 238.
Ferry Co. vs. Pennsylvania 114 U. S. 196, 29 Law Ed. 158.
Hannibal R. R. Co. vs. Husen, 95 U. S. 465.
Chicago Ry. Co. vs. Solan, 169 U. S. 133.
Sherlock vs. Alling, 93 U. S. 99.

The regulation of a motor bus carrying passengers for hire between the City of Niles, Michigan and South Bend, Indiana, is not a subject which necessarily requires uniformity of regulation throughout the United States and Congress not yet having regulated the subject the reguulation by the State and City is not an unconstitutional interference with interstate commerce.

Henricks vs. Maryland 235 U. S. 610, 59 Law Ed. 385.
Comas Stage Co. vs. Kozer, 104 Or. 600, 209 Pac. 95, 25 A. L. R. 27.
Wiggins Ferry Co. vs. City of East St. Louis, 107 U. S. 365; 27 Law Ed. 419.

Counsel for Defendant in Error, at near the close of Page 9 in his brief, say in effect that in the case under consideration Defendant was doing an exclusively interstate business. The facts, it appears to us, do not justify this conclusion. It is admitted and so stated in his statement of facts near the bottom of Page 4, that defendant "did not restrain his passengers from leaving his motor bus prior to reaching the destination for which they had paid." The fact that the fare paid entitled the passengers to travel into or to the State of Michigan does not of itself prove conclusively that it was interstate business. This fact is but one of the elements which might be considered in determining whether or not defendant was doing an interstate business. The fact that he accepted passengers along his

route in and through the City of South Bend and took them along his route towards the city of Niles, and particularly in view of the further fact that along his route outside the City of South Bend and in the State of Indiana is the village of Roseland and are many suburban residences, the inhabitants of which are likely to be patrons, would, be stronger elements than prices alone to determine whether or not said defendant was doing an exclusively interstate business.

CONCLUSION

Defendant in Error, the City of South Bend, Indiana, respectfully contends that the judgment of the Supreme Court of the State of Indiana is correct and should be sustained and affirmed and for such action respectfully prays this Court.

IDEN S. ROMIG,
Attorney for Defendant in Error.

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SUPREME COURT OF THE UNITED STATES.

No. 208.—October Term, 1927.

Otis Sprout, Plaintiff in Error, *vs.* City of South Bend, Indiana.	On Writ of Error to the Supreme Court of the State of Indiana.

[May 14, 1928.]

Mr. Justice Brandeis delivered the opinion of the Court.

By ordinance adopted in 1921, South Bend, Indiana, prohibited, with exceptions not here material, the operation on its streets of any motor bus for hire unless licensed by the city. Sprout, a resident of that State, operated regularly a bus with seats for twelve persons between points within South Bend and the City of Niles, Michigan. He paid the state registration fee but refused to apply for a city license. In 1923, he was prosecuted by the city in a local court for violation of the ordinance and defended on the ground that it was invalid as applied to him. The case was heard on agreed facts. Sprout claimed, among other things, that the ordinance violated the commerce clause and the equal protection clause of the Fourteenth Amendment. These claims were overruled; a penalty of $50 was imposed; and the judgment of the trial court was affirmed by the highest court of the State, 198 Ind. 563. The case is here on writ of error. Compare *John P. King Manufacturing Co.* v. *City Council of Augusta*, No. 392, this day decided.

The ordinance prescribes license fees varying with the seating capacity of the bus. That for a bus with seats for twelve persons is $50 a year. Before the license can issue, the applicant must file with the city a contract of liability insurance providing for the payment of any final judgment that may be rendered for damages to property or the person resulting from the negligent operation of the bus within the city. The amount of insurance required is limited to a liability of $1,000 to any one person and of $2,500 for

damages arising from a single accident. The insurance must be furnished by a company authorized to do business within the State. These requirements apply alike to busses operating wholly within the city and to those operating from points within it to points without. The ordinance makes no distinction between busses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce. Nor does the ordinance, in its requirement of liability insurance, distinguish in terms between liability to passengers travelling interstate and other liability resulting from negligent operation.

The claim that the ordinance violates the Fourteenth Amendment is rested mainly upon the ground that Sprout is required to furnish insurance issued by a company authorized to do business in Indiana. That contention may be quickly disposed of. The provision limiting the insurance to such companies is obviously a reasonable one so far as Sprout is concerned. Compare *La Tourette* v. *McMaster*, 248 U. S. 465, 468. The further objection that the requirement discriminates against insurance companies not authorized to do business within the State is not open to the plaintiff in error. *Cronin* v. *Adams*, 192 U. S. 108, 114; *Erie R. R. Co.* v. *Williams*, 233 U. S. 685, 705; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 149.

The claim that the ordinance violates the commerce clause presents questions requiring serious consideration. Sprout did not carry passengers from one point in South Bend to another. He was not a local carrier. Primarily his business was interstate. But the agreed facts show that he was not engaged exclusively in interstate commerce. The distance from the north city limits of South Bend to Niles is about nine miles. Half of this distance lies within Indiana. Along the highway traversed within that State lie many suburban residences and one village tributary to South Bend. Sprout purported to offer transportation from that city only to persons destined to points in Michigan. He required that all passengers from South Bend pay the fare to some Michigan point. But, in fact, he served suburban passengers. He made stops habitually at points within Indiana in order to permit passengers from South Bend to leave the bus before the state-line was reached. The legal character of this suburban bus traffic was not affected by the device of requiring the payment of a fare fixed for some Michi-

gan point or by Sprout's professing that he sought only passengers destined to that State. The actual facts govern. For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce. Compare *Philadelphia & Reading Ry. Co.* v. *Hancock*, 253 U. S. 284; *Baltimore & Ohio R. R. Co.* v. *Settle*, 260 U. S. 166, 171. The suburban traffic was intrastate commerce.

The Supreme Court of Indiana did not pass upon the question whether Sprout, by reason of the suburban traffic, was engaged also in intrastate traffic. Nor did it consider whether his rights as an interstate carrier would be affected by his engaging also in intrastate business. It affirmed the judgment of the trial court on the broad ground that, since Sprout made use of the streets in "the indiscriminate solicitation and acceptance of passengers," he was "within the police power of the state to license and regulate both driver and vehicle by way of providing for the safety, security and general welfare of the public."

It is true that, in the absence of federal legislation covering the subject, the State may impose, even upon vehicles using the highways exclusively in interstate commerce, non-discriminatory regulations for the purpose of insuring the public safety and convenience; that licensing or registration of busses is a measure appropriate to that end; and that a license fee no larger in amount than is reasonably required to defray the expense of administering the regulations may be demanded. *Hendrick* v. *Maryland*, 235 U. S. 610, 622; *Kane* v. *New Jersey*, 242 U. S. 160; *Morris* v. *Duby*, 274 U. S. 135; *Clark* v. *Poor*, 274 U. S. 554. Compare *Hess* v. *Pawloski*, 274 U. S. 352. These powers may also be exercised by a city if authorized to do so by appropriate legislation. Compare *Erb* v. *Morasch*, 177 U. S. 584, 585; *Mackay Telegraph Co.* v. *Little Rock*, 250 U. S. 94, 99. Such regulations rest for their validity upon the same basis as do state inspection laws, *Patapsco Guano Co.* v. *Board of Agriculture*, 171 U. S. 345; *Red "C" Oil Co.* v. *Board of Agriculture*, 222 U. S. 380, and municipal ordinances imposing on telegraph companies, though engaged in interstate commerce, a tax to defray the expense incident to the inspection of poles and wires. *Western Union Telegraph Co.* v. *New Hope*, 187 U. S. 419; *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252, 258; *Mackay Telegraph Co.* v. *Little Rock*, 250 U. S. 94, 99.

But it does not appear that the license fee here in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such a purpose. It follows that the exaction of the license fee cannot be sustained as a police measure. *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S. 160, 164; *Postal-Telegraph Cable Co.* v. *New Hope*, 192 U. S. 55; *Adams Express Co.* v. *New York*, 232 U. S. 14, 32. Compare *Foote & Co.* v. *Stanley*, 232 U. S. 494, 503.

It is true also that a State may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways. *Hendrick* v. *Maryland*, 235 U. S. 610, 622; *Interstate Busses Corporation* v. *Blodgett*, No. 197, decided February 20, 1928. And this power also may be delegated in part to a municipality by appropriate legislation. Compare *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 98; 149 U. S. 465. An exaction for that purpose may be included in a license fee. *Hendrick* v. *Maryland, supra; Kane* v. *New Jersey*, 242 U. S. 160, 168-169; *Clark* v. *Poor*, 274 U. S. 554. But no part of the license fee here in question may be assumed to have been prescribed for that purpose. A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways. And there is no suggestion, either in the language of the ordinance or in the construction put upon it by the Supreme Court of Indiana, that the proceeds of the license fees are, in any part, to be applied to the construction or maintenance of the city streets. Compare *Tomlinson* v. *City of Indianapolis*, 144 Ind. 142; *City of Terre Haute* v. *Kersey*, 159 Ind. 300; *Hogan* v. *City of Indianapolis*, 159 Ind. 523.

It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise for the use of the streets of the city. It remains to consider whether it can be sustained as an occupation tax. A State may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. *Postal*

Telegraph Cable Co. v. *Charleston*, 153 U. S. 692; *Osborne* v. *Florida*, 164 U. S. 650; *Kehrer* v. *Stewart*, 197 U. S. 60; *Watters* v. *Michigan*, 248 U. S. 65; *Raley & Bros.* v. *Richardson*, 264 U. S. 157. Compare *Interstate Busses Corporation* v. *Holyoke Street Ry. Co.*, 273 U. S. 45; *Arnold* v. *Hanna*, No. 155, decided January 16, 1928. And it may delegate a part of that power to a municipality. Compare *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252, 257. But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business. *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58; *Adams Express Co.* v. *New York*, 232 U. S. 14, 30; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 647. Compare *Williams* v. *Talladega*, 226 U. S. 404, 417; *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252. The Supreme Court of Indiana, far from construing the ordinance as applicable solely to busses engaged in intrastate commerce, assumed that it applied to busses engaged exclusively in interstate commerce and that Sprout was so engaged. The privilege of engaging in such commerce is one which a State cannot deny. *Buck* v. *Kuykendall*, 267 U. S. 407; *Bush & Sons Co.* v. *Maloy*, 267 U. S. 417. A State is equally inhibited from conditioning its exercise on the payment of an occupation tax.

Objection under the commerce clause is made also to the requirement of liability insurance. There being grave dangers incident to the operation of motor vehicles, a State may require users of such vehicles on the public highways to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries, resulting from their operation. *Packard* v. *Banton*, 264 U. S. 140. Compare *Kane* v. *New Jersey*, 242 U. S. 160, 167; *Hess* v. *Pawloski*, 274 U. S. 352; *Clark* v. *Poor*, 274 U. S. 554, 557. It may, consistently with the Federal Constitution, delegate by appropriate legislation a part of this power to a municipality. Such provisions for insurance are not, even as applied to busses engaged exclusively in interstate commerce, an unreasonable burden on that commerce, if limited to damages suffered within the State

by persons other than the passenger. Whether the insurance here prescribed is, because of its scope, obnoxious to the commerce clause, we need not inquire. Compare *Adams Express Co.* v. *New York*, 232 U. S. 14, 33; *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570, 577. For the ordinance is void because of the imposition of the license fee.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.